

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al., } Docket No. 10 C 5711
Plaintiffs, }
vs. }
PACKAGING CORPORATION OF AMERICA, } Chicago, Illinois
et al., } May 30, 2012
Defendants. } 10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - RULE 16 CONFERENCE
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN
VOLUME 1-A

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10:04:46 1 (The following proceedings were had in open court:)

10:10:00 2 THE COURT: Good morning, everyone. We are on the
10:10:04 3 record in the courtroom. My name is Nan Nolan.

10:10:14 4 THE CLERK: 10 C 5711, Kleen Products v. Packaging
10:10:16 5 Corporation.

10:10:16 6 THE COURT: Okay. Thank you. It's a referral from
10:10:20 7 Judge Shadur, and we are having what we are calling, for want
10:10:26 8 of a better word, a Rule 16 conference, a number of discovery
10:10:32 9 issues. The parties have been -- I think done this amazing
10:10:38 10 work cooperating. We have run into -- as anybody would, we
10:10:46 11 have run into some issues that need further exploration to
10:10:50 12 either decide if we are going to be able to work them out, if
10:10:58 13 not today, with further meet and confers, or if we really run
10:11:02 14 into an impasse, if certain briefing is going to happen.

10:11:04 15 So we had -- Temple-Inland is our guinea pig for this
10:11:16 16 since the plaintiffs have to come to all three of them. We
10:11:20 17 are doing them individually with three of the defendants. So
10:11:22 18 let's have Mr. Mogin, will you introduce your team?

10:11:26 19 MR. MOGIN: Good morning, your Honor. Dan Mogin on
10:11:28 20 behalf of the plaintiffs. With me is Matt Van Tine from the
10:11:36 21 Miller Law firm, who is our Temple-Inland specialist; Michael
10:11:40 22 Freed; and Robert Wozniak.

10:11:46 23 THE COURT: And for one time you outnumber the
10:11:48 24 defendants.

10:11:50 25 Now, for Temple-Inland, Ms. Miller, will you

10:11:52 1 introduce people?

10:11:54 2 MS. MILLER: Sure. Britt Miller, from Mayer Brown on
10:11:58 3 behalf of Temple-Inland, and with me is Andrew Marovitz.

10:12:02 4 THE COURT: Good.

10:12:06 5 All right. So would anybody like to say anything
10:12:08 6 specific before we begin? And you can use this one,
10:12:14 7 plaintiffs, and we will kind of share this one here.

10:12:20 8 Anybody have any opening comments?

10:12:22 9 MR. MOGIN: Your Honor, you had sent out or had
10:12:26 10 Mr. Campbell send out a list of subjects the other day, and to
10:12:32 11 a large extent, we have been discussing those subjects as
10:12:36 12 discrete issues. But as we were preparing for today's
10:12:42 13 hearing, it dawned on us that some of those issues are
10:12:46 14 actually quite integrated. For example, the custodians issue,
10:12:54 15 which was first on your list. There are certain implications
10:12:56 16 for that issue in the parsing issue, which was fourth or fifth
10:13:02 17 on your list. So I think it would be -- I just wanted to
10:13:08 18 point that out so that we didn't think in terms of these issue
10:13:14 19 silos and that there was some understanding of the crossover
10:13:16 20 or integration of the issues.

10:13:20 21 I guess I could -- if you want me to start, I will.

10:13:24 22 MR. MAROVITZ: If I could, just quickly. There
10:13:28 23 certainly are among the topics some relationships. We did
10:13:40 24 begin to discuss many of these topics during our last session
10:13:42 25 last week with the court, and Temple-Inland is a little

10:13:44 1 different than the two defendants about whom you will hear
10:13:48 2 tomorrow because I think with respect to those defendants,
10:13:50 3 there was no discussion about these individual topics; whereas
10:13:56 4 for Temple-Inland, there was substantial discussion about at
10:13:58 5 least some of them.

10:14:02 6 We are happy to proceed as the court would like. For
10:14:06 7 us, we really would like to have a chance to be heard on some
10:14:10 8 of the issues that time simply didn't permit us to be heard on
10:14:14 9 last week, and the issue for us that's primary is the parsing
10:14:20 10 issue. That was one that we wanted to be heard on last week,
10:14:24 11 and there just were many parties and insufficient time.

10:14:28 12 So our goal is not to --

10:14:32 13 THE COURT: Tell me what your initial -- what you
10:14:36 14 would like to cover today.

10:14:38 15 MR. MAROVITZ: For today, parsing is first and
10:14:40 16 foremost; and after that, I think in some respect, we have
10:14:44 17 covered the other topics that apply to Temple-Inland.

10:14:52 18 THE COURT: Tell me which one of our 400 lists that
10:14:56 19 we have made in the last two weeks are you talking about?

10:14:58 20 MR. MAROVITZ: So there were -- just to set the
10:15:00 21 stage, there were five topics that Mr. Campbell circulated,
10:15:04 22 and then there were three more that the plaintiffs wished to
10:15:06 23 have added. The five topics that Mr. Campbell circulated
10:15:12 24 were, one, custodians; two, word indexes; three, litigation
10:15:18 25 holds; four, Rule 30(b)(6) depositions; five, parsing.

10:15:24 1 THE COURT: Okay.

10:15:26 2 MR. MAROVITZ: And then the three additional topics

10:15:28 3 were time periods for defendants' responses to the requests

10:15:32 4 for production.

10:15:32 5 THE COURT: Right.

10:15:32 6 MR. MAROVITZ: Organization correlation of search

10:15:36 7 strings to request for production, and then inactive data and

10:15:40 8 backup tapes was the last one.

10:15:42 9 So in some sense, we have covered --

10:15:44 10 THE COURT: We can do that in the first hour.

10:15:46 11 MR. MAROVITZ: Well, no, but all kidding aside, we

10:15:50 12 have actually covered for Temple-Inland many of these topics.

10:15:52 13 I think the conversation you have tomorrow with the other

10:15:56 14 defendants who didn't cover any part of this will be more

10:15:58 15 expansive. But the one topic for us that we just didn't get a

10:16:04 16 chance to cover was parsing, so we would like to reserve

10:16:06 17 enough time so we can be heard fully on that topic.

10:16:10 18 That's the real -- you may remember, Judge, we were

10:16:12 19 sort of in between and betwixt with respect to the group of

10:16:18 20 defendants. I think plaintiffs really wanted to proceed with

10:16:22 21 Georgia-Pacific and International Paper and had proceeded with

10:16:26 22 the other ones, we were sort of in the middle, and the reason

10:16:30 23 we were interested in being here today was so that we could

10:16:32 24 have a chance to educate the court about the parsing issue.

10:16:34 25 THE COURT: When we were putting this together, when

10:16:44 1 Chris and I were putting this together, we see a large overlap
10:16:48 2 of issues too, which is, I think, true in all cases but
10:16:54 3 particularly in this case.

10:16:56 4 And we had first -- because I think whether we are
10:17:06 5 calling it parsing or request to produce documents -- I mean,
10:17:10 6 the request to produce documents, we thought maybe we should
10:17:16 7 start with that, and we should start with that because I need
10:17:22 8 to understand -- I need some basic understanding of how the
10:17:36 9 defendants decided to answer some of these questions, which I
10:17:42 10 don't know whether it is a custodian issue or not. That's
10:17:44 11 what I need to know because I think that that would then frame
10:17:50 12 some of the other issues.

10:17:52 13 So I don't want the whole day. In fact, I'd like to
10:17:56 14 give us until 11:15, see what we can do. But I actually
10:18:02 15 wanted to walk through, if we could, the request to produce,
10:18:06 16 unless you have already had meet and confers on all of this
10:18:12 17 and you know the answer.

10:18:16 18 MR. MOGIN: I can't say that we really had meet and
10:18:18 19 confers on all of this.

10:18:18 20 THE COURT: I certainly don't mean all --

10:18:22 21 MR. MOGIN: No, I mean, as it's framed within the
10:18:24 22 parsing context. From our perspective, your Honor, we have to
10:18:28 23 this point been concentrating on what we have referred to as
10:18:32 24 the common issues, and the parsing issue is really more of an
10:18:38 25 individual issue because each defendant chose to respond,

10:18:42 1 while there are certain commonalities, you have to quite
10:18:46 2 literally parse through each individual defendant's response
10:18:52 3 to understand the differences, as well as to understand the
10:19:00 4 corpus of what's being produced. And we have had a lot of
10:19:06 5 discussion about what's the proper corpus.

10:19:12 6 I will give you -- if you want, I can start and give
10:19:18 7 you our perspective of what's happened.

10:19:22 8 MR. MAROVITZ: Judge, just to give you some
10:19:22 9 background as well. Before I walk through the whole issue,
10:19:30 10 Mr. Van Tine wrote us a letter which I think you have in front
10:19:34 11 of you which is attached as tab 10 to the submission that we
10:19:40 12 put before you --

10:19:40 13 THE COURT: Okay.

10:19:42 14 MR. MAROVITZ: -- that identifies with precision the
10:19:46 15 various requests for production that interested the
10:19:52 16 plaintiffs, and we committed to getting them a letter in
10:19:54 17 response. Given the amount of work we had over the last week
10:19:58 18 and a half, we haven't had a chance to do that response but
10:20:02 19 still intend to do it. So we will be responding with a formal
10:20:06 20 letter that identifies more specifically responses that they
10:20:14 21 have called out in their May 14th, 2012, letter.

10:20:18 22 And so I agree with Mr. Mogin, we haven't had a meet
10:20:22 23 and confer yet over these specific responses that are -- I
10:20:30 24 will put it differently. We haven't had a meet and confer yet
10:20:34 25 over the specific points raised by the May 14th letter, but as

10:20:38 1 part of the parsing issue that we want to discuss today, we
10:20:40 2 have had a lot of conversations about our requests for
10:20:44 3 production and the responses. And so that's -- that, I think,
10:20:46 4 would be an appropriate focus for today. We are happy to talk
10:20:50 5 to you about what's in the letter too. We just haven't
10:20:54 6 responded formally to plaintiffs' letter yet of May 14.

10:20:58 7 MR. MOGIN: And here I was going to ask the reporter
10:21:00 8 to mark that sentence where you said I agree with Mr. Megin,
10:21:04 9 but then a paragraph later you took it back.

10:21:10 10 THE COURT: All right. Here's where fresh eyes
10:21:12 11 sometimes help, which is one of the things that I think is
10:21:16 12 good about a Rule 16 is since Chris and I haven't been
10:21:22 13 involved in the case for the same period of time you folks
10:21:28 14 have been looking at it.

10:21:30 15 The reason I wanted to start, just a straight start
10:21:34 16 with RPD number 1, not with -- everything else, I want -- I
10:21:44 17 have some real basic questions that I want to know, but I
10:21:50 18 don't want to use your term "parsing" because I think it takes
10:21:52 19 on some significance, but I want to ask them why they answered
10:21:58 20 the question the way they did. Okay? Because I don't know --
10:22:04 21 I just -- I think I know what the answer is, but I want to
10:22:08 22 hear what they say the answer is.

10:22:12 23 So let's start, because these things build, and we
10:22:16 24 are not going to do all 99, but I think we are going to get,
10:22:20 25 Mr. Marovitz, to your P word, the parsing issue.

10:22:26 1 MR. MOGIN: Your Honor, I don't mean to interrupt,
10:22:28 2 but please do recall as you go through these that we have
10:22:30 3 divided these up basically into two groups, the first group
10:22:34 4 being what we call the conduct-related requests.

10:22:38 5 THE COURT: Thank you for reminding me. What does
10:22:40 6 that go to, 1 to what?

10:22:46 7 MR. VAN TINE: Basically, this May 14 letter is
10:22:52 8 directed at the conduct request.

10:22:52 9 THE COURT: Are they -- certain numbers are conduct?

10:22:56 10 MR. MOGIN: Yes, your Honor.

10:22:58 11 MR. VAN TINE: If you look at the May 14 letter,
10:23:00 12 first page, footnote 1 identifies the conduct requests.
10:23:10 13 Although having said that, the RPD number 1 is not listed in
10:23:16 14 that footnote.

10:23:18 15 THE COURT: And it should be?

10:23:20 16 MR. VAN TINE: And it's the first one. It should be.
10:23:22 17 Well, it's a general issue.

10:23:24 18 THE COURT: All right. Do you both have a common
10:23:26 19 understanding of what "conduct" means?

10:23:30 20 MR. MOGIN: I think we do. I think that's something
10:23:32 21 that's evolved over the past nine or 10 months.

10:23:34 22 THE COURT: Why don't you tell us for the record,
10:23:38 23 what does conduct mean?

10:23:38 24 MR. MOGIN: It's probably easier to define in terms
10:23:42 25 of what "data" means and say that the rest are conduct.

10:23:48 1 So data are basically various requests for operating
10:23:52 2 data of the companies of the type that is most useful for
10:24:00 3 expert analysis, although not exclusively. So the data
10:24:06 4 requests tend to go to, for lack of a better term, the
10:24:10 5 economics of the case; whereas, the conduct tends to focus
10:24:16 6 more on the liability aspects of the case, although economics
10:24:20 7 and liability are not mutually exclusive terms.

10:24:26 8 THE COURT: So when you're saying "economics," you
10:24:28 9 mean damages?

10:24:30 10 MR. MOGIN: Damages, impact.

10:24:34 11 THE COURT: Okay.

10:24:34 12 MR. MOGIN: Economics set the context for a lot of
10:24:40 13 the conduct. In other words, behavior that might be
10:24:46 14 competitively innocuous in one economic setting may be
10:24:54 15 anti-competitive in a different economic setting.

10:24:58 16 THE COURT: Is this a definition you gave them when
10:25:00 17 you sent them the request to admit, or is this the way you are
10:25:04 18 looking at it a year later?

10:25:06 19 MR. MOGIN: This evolved out of a meet and confer
10:25:08 20 that we had last summer with what was then known as the Echols
10:25:14 21 group or committee, which was headed by Mr. Echols
10:25:18 22 representing PCA, and Ms. Miller was on that task force for
10:25:24 23 the defendants as well. It was basically a small group
10:25:26 24 negotiating with us, and they asked us because the issue arose
10:25:32 25 in the context of time periods. So for data, we need a more

10:25:38 1 extensive time period. That's plaintiffs' position. And for
10:25:42 2 conduct, we can take a somewhat shorter time period.

10:25:48 3 So they asked us to define which RPDs fell into which
10:25:52 4 of those two categories, and we did so with the one footnote,
10:25:58 5 that there were a number of requests that had to do with prior
10:26:00 6 litigation and investigation, which was originally treated as
10:26:06 7 a separate category altogether, a third category, for which
10:26:10 8 there was no time period associated. And that more or less
10:26:16 9 has been recently collapsed into the conduct period, although
10:26:20 10 not with respect to the time period issue.

10:26:28 11 THE COURT: All right.

10:26:30 12 MR. MOGIN: So we have -- just so you know, your
10:26:32 13 Honor, we have put the data or the transactional requests on a
10:26:38 14 different track. About a week and a half ago or so, we
10:26:44 15 received a proposal from Mr. McKeown on behalf of all of the
10:26:50 16 defendants for how to handle that in terms of extraction of
10:26:58 17 data from the defendants' various databases and presentation
10:27:02 18 to us, most particularly with respect to what field, what data
10:27:06 19 fields would be provided for us. The time period still has
10:27:12 20 not been resolved, but we are going -- there is a little bit
10:27:16 21 of back and forth on that, and the plaintiffs have been
10:27:20 22 reviewing that with their experts and others, and we
10:27:22 23 anticipate that we will respond very shortly.

10:27:24 24 THE COURT: Okay. So that certainly is a cross
10:27:28 25 issue; that will be an issue that would cut across a number of

10:27:30 1 the requests.

10:27:32 2 MR. MOGIN: Yes, but I think for your purposes today
10:27:36 3 that if we focus -- we would probably make the most progress
10:27:40 4 if we focus on the conduct requests.

10:27:44 5 THE COURT: And we have just put number 1 in conduct.

10:27:48 6 MR. MOGIN: Number 1 should have been in conduct,
10:27:50 7 yes.

10:27:50 8 THE COURT: All right. Okay. So RPD says, Seeks
10:28:04 9 organizational charts or other documents sufficient to show
10:28:08 10 the complete organizational structure directly or indirectly
10:28:12 11 relating to containerboard products, including a description
10:28:18 12 of the business functions or responsibilities of each of the
10:28:22 13 following:

10:28:24 14 A, predecessors, parents, subsidiaries, affiliates,
10:28:28 15 and joint ventures;

10:28:30 16 B, division, departments, segments, units, or
10:28:36 17 subdivisions; and,

10:28:36 18 C, board or management committees, subcommittees, or
10:28:44 19 working groups, and each of their related persons.

10:28:52 20 Plaintiffs say, Rather than produce the requested
10:28:54 21 documents, subject to their objections, Temple-Inland's
10:28:58 22 response indicates it will only produce organizational charts
10:29:00 23 for those executives with primary decisionmaking authority and
10:29:04 24 those persons who directly report to them and documents
10:29:10 25 sufficient to show its board of directors. For reasons that

10:29:16 1 are well known at this point, plaintiffs believe that such a
10:29:20 2 response restricting the sources in this matter is
10:29:24 3 unacceptable. This applies to all such responses.

10:29:28 4 Okay. So for the record, you are calling "parsing"
10:29:36 5 -- tell me how they parsed that answer so we have -- at least
10:29:42 6 we have a clear definition of how you're using parsing.

10:29:46 7 MR. MOGIN: All right. Well, to put it in context,
10:29:50 8 your Honor, from our perspective, what's happened is that
10:29:58 9 through the parsing process --

10:30:02 10 THE COURT: Well, I have to ask you something before
10:30:04 11 that. Did you, in fact, get an organizational chart and
10:30:10 12 documents that go with the executives with primary
10:30:14 13 decisionmaking authority? Is that what they actually turned
10:30:18 14 over to you?

10:30:20 15 MR. MOGIN: To some extent, yes.

10:30:22 16 THE COURT: Okay.

10:30:24 17 MS. MILLER: Your Honor, we produced literally
10:30:28 18 hundreds of pages of organizational charts.

10:30:30 19 THE COURT: Nobody is going to mention numbers today.

10:30:30 20 MS. MILLER: Lots of pages.

10:30:32 21 THE COURT: I mean, the numbers aren't the issue.
10:30:36 22 They really aren't. Either underwhelmed, overwhelmed,
10:30:40 23 anything.

10:30:40 24 So they did turn over to you, executives with primary
10:30:50 25 decisionmaking authority, they gave you a chart of that, and

10:30:54 1 they gave you documents that go with that, correct?

10:30:58 2 MR. MOGIN: Yes.

10:30:58 3 THE COURT: Okay. Now --

10:31:04 4 MR. MAROVITZ: I'm going to -- if I may, I'm going to
10:31:06 5 make one quick statement, and then I'm going to turn over the
10:31:10 6 specifics to Ms. Miller, who actually drafted the responses.

10:31:12 7 THE COURT: Yes.

10:31:14 8 MR. MAROVITZ: I'm glad the Court is asking about the
10:31:18 9 use of the word "parsing." We think that's a complete
10:31:22 10 misnomer. The word simply doesn't apply in this case, and I
10:31:28 11 know that the court wishes to go request by request, and we
10:31:34 12 are happy to do that because we think we have answered the
10:31:36 13 questions in a clear way that signals to the plaintiffs what
10:31:40 14 it is that we are and are not producing.

10:31:44 15 I do think it's really important for us to have an
10:31:48 16 opportunity to walk through the history of when the requests
10:31:54 17 came, what our objections were, what happened next, all the
10:31:58 18 meet and confers, and all the productions. I'd like to do
10:32:02 19 that this morning. I'd be happy to spend five minutes doing
10:32:06 20 it now.

10:32:06 21 THE COURT: Good.

10:32:08 22 MR. MAROVITZ: That would be great. We tried to put
10:32:12 23 together that chronology in some sense in tab 11.

10:32:16 24 THE COURT: Yes.

10:32:16 25 MR. MAROVITZ: Okay. So plaintiffs served their

10:32:24 1 document production request on May 3rd of 2011, so it was more
10:32:30 2 than a year ago. And one month later, in June of 2011,
10:32:38 3 Temple-Inland and the other defendants filed their responses,
10:32:42 4 and those responses are the ones that we are looking at now
10:32:48 5 attached as tab 1. Those responses respond to every request,
10:32:54 6 they outline our objections, they say what we're going to
10:32:56 7 produce, they say what we're not going to produce. Both sides
10:33:00 8 proceeded on that basis, so we had a series of meet and
10:33:04 9 confers since more than a year ago about those responses.

10:33:10 10 Tab 3 in the binder that we presented has an analysis
10:33:16 11 of what happened on July 5th regarding time periods and search
10:33:22 12 scope. Those were two issues that came up during the meet and
10:33:24 13 confers about our responses.

10:33:28 14 And then tab 6, which refers to August 11th of 2011,
10:33:34 15 is a lengthy letter of that date reflecting another meet and
10:33:38 16 confer that we had about specific requests, again, that were
10:33:44 17 part of the responses that we provided to the plaintiffs back
10:33:48 18 in June.

10:33:48 19 So after all that happened, the defendants then
10:33:54 20 developed a series of search strings that your Honor knows all
10:33:58 21 about given the ESI hearings, and the defendants, including
10:34:06 22 Temple-Inland, told the plaintiffs what it is that we were
10:34:08 23 doing, both before, during these meet and confer conferences,
10:34:14 24 as well as during the ESI hearings. You may remember that
10:34:22 25 Sandy Brown (phonetic) testified about the fact that the

10:34:24 1 search strings were designed to capture terms to be produced
10:34:30 2 in the litigation.

10:34:30 3 So based upon what we turned over in our responses in
10:34:34 4 June of 2011, and then the meet and confers we had for several
10:34:38 5 months after that, and then what we told the plaintiffs we
10:34:42 6 were going to do, and then the ESI hearings, we started making
10:34:46 7 substantial document productions to the plaintiffs that built
10:34:48 8 upon all of that work, and those productions were made between
10:34:54 9 August of 2011 and May of 2012, so more than a half a year
10:35:00 10 during that time. And those productions are recorded in the
10:35:04 11 time line that we provided in the last exhibits in the binder.

10:35:08 12 We then told the plaintiffs in the two statuses
10:35:10 13 before this one that we would be making a big production.
10:35:16 14 And, in fact, just earlier this month, we produced the
10:35:22 15 equivalent, when you look at all the ESI, of more than a
10:35:26 16 million pages of paper. I won't say more about it than that.
10:35:30 17 I won't say more about it than that.

10:35:30 18 THE COURT: Okay. That's fine.

10:35:30 19 MR. MAROVITZ: We produced a lot of pages.

10:35:32 20 THE COURT: You did.

10:35:32 21 MR. MAROVITZ: There is no dispute about that.

10:35:36 22 So we haven't run exact figures on the cost of all
10:35:38 23 this, but I believe personally that Temple-Inland spent more
10:35:42 24 than a million dollars on this process, probably a lot more
10:35:46 25 than a million dollars in this process. Only after that

10:35:48 1 process was all done did we hear the word "parsing." And in
10:35:58 2 the letter that we are looking at now, the May 14th, 2012,
10:36:02 3 letter that your Honor started with, there is a statement in
10:36:10 4 the first paragraph that says that your client did not follow
10:36:14 5 ordinary procedure by searching for and producing all
10:36:18 6 requested responsive documents in its possession, custody, or
10:36:22 7 control.

10:36:24 8 THE COURT: Not August 11th.

10:36:24 9 MR. MAROVITZ: No, it's tab 10.

10:36:26 10 THE COURT: Tab 10, sorry. Okay.

10:36:32 11 MR. MAROVITZ: And then it's the third line, and it
10:36:34 12 says, Your client did not follow ordinary procedure by
10:36:38 13 searching for and producing all requested responsive documents
10:36:42 14 in its possession, custody, or control from the indicated
10:36:44 15 sources subject to such objections.

10:36:48 16 So what the plaintiffs are saying there is that it's
10:36:50 17 common procedure for lawyers to serve objections and then
10:36:56 18 produce everything anyway. And that's not my experience. I
10:37:00 19 don't think it's anybody's experience around this table.

10:37:04 20 What we did is we objected and we told the plaintiffs
10:37:10 21 what it was that we would produce, and then we spent months
10:37:14 22 and more than a million dollars putting it together and
10:37:18 23 producing it. So the import of the May 14th letter is that
10:37:24 24 despite all that work, Temple-Inland should now simply
10:37:28 25 withdraw all its objections, go back and produce all the stuff

10:37:32 1 it said it wouldn't produce before.

10:37:36 2 The reason that we know that that's not the ordinary
10:37:40 3 way that people do productions in these sorts of cases is that
10:37:44 4 that's not the way the plaintiffs did it in this case. So the
10:37:50 5 defendants also served document production requests to the
10:37:54 6 plaintiffs. And if we look at tab 2 of what it was that we
10:38:02 7 gave you, this is the plaintiffs' responses and objections to
10:38:06 8 our requests for the production of documents. And on page 11
10:38:14 9 of tab 2 in response to our request No. 16, if you look at the
10:38:20 10 bottom of that page, you can see that plaintiffs took the
10:38:24 11 position that they had objections and that they would not
10:38:28 12 produce documents in response to request No. 16. And, indeed,
10:38:32 13 I believe plaintiffs have honored their commitment and not
10:38:38 14 produced those documents. They said they weren't going to do
10:38:40 15 it, and I don't think they did it, and they told us they
10:38:42 16 weren't going to do it.

10:38:42 17 So the notion that everybody simply produces
10:38:48 18 everything and then puts forth all kinds of objections for
10:38:56 19 just some sort of -- to make some sort of a record is just not
10:39:02 20 the way it's done.

10:39:04 21 We know -- we know that the parties have been focused
10:39:08 22 on many common issues, like predictive coding and Boolean
10:39:14 23 searches and ESI hearings of the sort that I have never been
10:39:18 24 involved in before, and there's been a lot of work for
10:39:20 25 everybody. But the notion somehow that, you know, 11 months

10:39:28 1 later, you can send a letter that accuses the other side of
10:39:34 2 parsing after all this work has been done by us, all this
10:39:38 3 money has been spent and all of these documents produced, and
10:39:42 4 where there have been actual meet and confers about these, at
10:39:46 5 least as to many general issues, and some specific ones, we
10:39:50 6 think is -- it's just not our perspective of the way that this
10:39:58 7 should have occurred, and we think that it's going -- that any
10:40:02 8 kind of sort of specific, you know -- well, let me just stop
10:40:12 9 there. I think it's not the way that this should have
10:40:14 10 happened, and it's going to cause an incredible amount of
10:40:20 11 burden and cost to our client after it's done just a
10:40:26 12 remarkable amount of work in terms of responding and telling
10:40:28 13 the plaintiffs what we were and weren't going to do.

10:40:32 14 That's why I wanted to be heard on parsing.

10:40:34 15 THE COURT: I understand.

10:40:36 16 MR. MAROVITZ: That said, we are --

10:40:38 17 THE COURT: All right. So I am intending, the reason
10:40:42 18 I was going to use document -- okay. So in the 14 years,
10:40:52 19 2,000 or so, more than 2,000 cases I have supervised in
10:40:58 20 discovery, granted, they're not antitrust cases. Okay? The
10:41:04 21 normal procedure in the non-cooperative mode, in a motion
10:41:10 22 mode, would be you get a request to produce, one person comes
10:41:18 23 in and says, It's overly broad -- they don't answer. Okay? I
10:41:22 24 mean, I half agree with what you are saying. The normal is we
10:41:26 25 go into motion practice. They come -- the defendants come in

10:41:32 1 and say, Overly broad, don't understand their terms, what's
10:41:38 2 the difference between relating and concerning, it's
10:41:40 3 burdensome, it's yada, yada, yada, the judge sits there with
10:41:44 4 92 for seven people, comes up with some order, and says, You
10:41:48 5 win this, you win that, you lose, take half, good-bye. Okay?

10:41:54 6 I think to your credit, to both of your credit, all
10:42:02 7 the way through, you have tried to carve out this new way to
10:42:06 8 do discovery. You haven't wasted one thing, even if we have
10:42:14 9 to tweak some of these requests to produce right now. That's
10:42:16 10 all I am talking about. I want to take waiver and timing off
10:42:22 11 the table on this. I am not going to ask you to do
10:42:26 12 cooperation and then turn around and whack you with some --
10:42:32 13 somebody waived it, somebody -- why the heck didn't he come in
10:42:36 14 on a motion to compel? I mean, truthfully, it's not just why
10:42:40 15 didn't you come in and say, Overly broad. Why didn't they --
10:42:44 16 you know, my question is, Why the heck did you wait 11 months?
10:42:46 17 Okay? I know I could do that. I understand the power of this
10:42:54 18 job. You folks have been trying your darndest to do it in a
10:43:04 19 new way, and this particular one has sort of fallen through
10:43:06 20 the cracks.

10:43:06 21 I am not thinking we could sit here, even if we sat
10:43:08 22 here for, you know, three days straight, could we agree on all
10:43:12 23 of this. But Chris and I need to understand what your
10:43:20 24 rationale was on some of these decisions because they seem to
10:43:24 25 us that they really are about something else and not the exact

10:43:28 1 request that's in front of you. And you may not have even
10:43:32 2 realized that back in '11. I mean, you know so much more
10:43:36 3 about the case now. I mean, maybe if we were writing a
10:43:42 4 protocol for the future on how to do a cooperative model,
10:43:50 5 maybe requests to produce shouldn't be done until a year into
10:43:54 6 discovery because you needed some of the information to even
10:43:58 7 be able to figure what these things were.

10:44:00 8 So what I am -- it's a long way of saying
10:44:06 9 Georgia-Pacific made a specific objection, kind of like an old
10:44:10 10 school kind of it's too late, you didn't object, you didn't do
10:44:14 11 that. I think the only thing I can say in fairness right now
10:44:18 12 is -- to encourage you to keep cooperating is that if we are
10:44:24 13 going to change the rules, we should change the rule from now
10:44:26 14 going forward, it shouldn't be in the past, because you were
10:44:32 15 trying your darnedest to do it.

10:44:34 16 I'm telling you, Mr. Marovitz, the stuff you turned
10:44:38 17 over isn't wasted on anything.

10:44:40 18 Let's go to No. 1. I will tell you what I am
10:44:44 19 thinking on No. 1.

10:44:46 20 All right. So the No. 1 is -- the No. 1 says, Give
10:44:52 21 us an organizational chart or other documents sufficient to
10:44:58 22 show your complete organizational structure.

10:45:02 23 So, Ms. Miller, when you changed that or when you
10:45:08 24 answered, Yes, we will give you executives with primary
10:45:14 25 decisionmaking authority, what was your rationale for that?

10:45:20 1 MS. MILLER: The rationale for that -- and to be
10:45:22 2 clear, if you look at the actual response, we did not simply
10:45:24 3 limit it to that. We also agreed, as requested to produce,
10:45:30 4 documents sufficient to show our board of directors, which is
10:45:32 5 one of the things they say we didn't do, we would produce
10:45:36 6 documents sufficient to show our board of directors for the
10:45:38 7 period as well.

10:45:38 8 The rationale was -- I will talk about the rationale,
10:45:42 9 and then I will tell you what actually got produced to give a
10:45:44 10 little context.

10:45:44 11 THE COURT: Okay.

10:45:46 12 MS. MILLER: The rationale was simply if you look at
10:45:48 13 plaintiffs' complaint in terms of what they are alleging, they
10:45:50 14 are alleging price fixing and they are alleging restraint on
10:45:54 15 capacity. There are a certain number of people in the company
10:45:56 16 that can make those decisions. The folks on the floor of the
10:45:58 17 paper mill can't make those decisions.

10:46:00 18 THE COURT: Right.

10:46:00 19 MS. MILLER: The folks that are sitting out in local
10:46:02 20 sales offices can't make those decisions. The people that can
10:46:06 21 be involved in the conspiracy that plaintiffs are alleging are
10:46:10 22 the people that have the ability to set prices and to control
10:46:14 23 capacity and to make those other types of decisions to
10:46:16 24 participate in this alleged conspiracy.

10:46:20 25 THE COURT: Or to carry out the orders.

10:46:22 1 MS. MILLER: Exactly.

10:46:22 2 So what we did is we provided -- in terms of actual
10:46:28 3 organizational charts, we provided our -- what we call our
10:46:30 4 main organizational chart which has the management structure,
10:46:36 5 essentially, of our containerboard and corrugated products
10:46:40 6 division. We also produced a whole series of organizational
10:46:46 7 charts that showed the people underneath that.

10:46:48 8 THE COURT: Oh, you did?

10:46:48 9 MS. MILLER: Oh, yeah. Including going down to sales
10:46:52 10 levels and regional sales levels, even though those weren't
10:46:56 11 the decisionmakers. We provided those organizational charts
10:46:58 12 as well.

10:47:00 13 We are still looking for an organizational chart that
10:47:02 14 will show our board of directors, but that may just be our
10:47:06 15 10Ks and our 10Qs that shows who our board of directors were
10:47:12 16 during the relevant period. There is no organizational chart
10:47:12 17 that shows who our board of directors were, but we are
10:47:16 18 producing documents that will be sufficient to show that
10:47:18 19 information. We have produced organizational charts
10:47:22 20 sufficient to show all of the people that had decisionmaking
10:47:24 21 responsibility during the period, as well as the people
10:47:26 22 underneath them.

10:47:26 23 THE COURT: Now, I didn't understand that.

10:47:30 24 MR. MOGIN: Well, I would like to know, since they
10:47:32 25 seem to have such specific information about this, what

10:47:36 1 documents are we talking about and when were they produced,
10:47:40 2 Bates numbers and dates, and maybe we can verify that.

10:47:46 3 This gets back to the issue, another one of the
10:47:50 4 issues we have been talking about from the get-go, which was
10:47:54 5 organizational and correlation. They seem to have the
10:47:56 6 information about what they actually produced in response to
10:47:58 7 specific RPDs.

10:48:00 8 THE COURT: I thought in your parsing argument, your
10:48:02 9 argument was you only got an organizational chart of
10:48:08 10 executives with primary decisionmaking authority and those
10:48:14 11 persons who directly report to them.

10:48:18 12 MR. MOGIN: No, your Honor. You are missing the
10:48:20 13 chronology. I'm sorry. We got their response to the RPD
10:48:24 14 request before we ever got a document.

10:48:26 15 THE COURT: Right.

10:48:26 16 MR. MOGIN: So they're telling us what they're going
10:48:28 17 to produce. And then it was during the Brown testimony that
10:48:32 18 it came out that based upon the objections, et cetera, that
10:48:38 19 matters were being excluded, and then that was confirmed
10:48:42 20 approximately a month ago when we had the first series of
10:48:46 21 individualized meet and confers with respect to Temple-Inland.
10:48:50 22 So it's not a situation where we can go and look at what's
10:48:54 23 actually been produced and compare it to the RPDs, not at this
10:48:58 24 point, not when they have just -- Temple-Inland is six months
10:49:02 25 away from completing their document production.

10:49:04 1 MR. VAN TINE: Actually -- actually, the chronology
10:49:08 2 of the document production is that some general preliminary
10:49:14 3 documents were produced before this month.

10:49:20 4 THE COURT: Okay.

10:49:20 5 MR. VAN TINE: It was only this month that
10:49:24 6 Temple-Inland began its substantial document production, and
10:49:32 7 it's just the beginning. And as Mr. Mogin just mentioned,
10:49:36 8 it's going to be -- they're telling us it's going to be a half
10:49:42 9 a year before we have all the documents that they say that
10:49:44 10 we're going to get. So we have not had an opportunity to
10:49:52 11 review the large batch that we got this month, and, obviously,
10:49:58 12 we haven't reviewed what we haven't gotten yet.

10:50:02 13 So this -- this letter is based on what they said
10:50:08 14 they would produce to us in their response to the request to
10:50:14 15 produce. It's not based on review of the documents.

10:50:18 16 THE COURT: But, honestly, before we get to indexing,
10:50:22 17 correlation, whatever we want to call it, because you don't
10:50:24 18 have the documents yet, so you don't even know if they
10:50:28 19 correlate --

10:50:28 20 MR. VAN TINE: Correct.

10:50:28 21 THE COURT: -- I thought the parsing argument -- I
10:50:32 22 mean, I am just trying to get my arms around this parsing
10:50:34 23 argument. I thought parsing argument number one was, you
10:50:40 24 said, Give us organizational charts of your whole
10:50:44 25 organization, and they came back and said, We're giving it to

10:50:48 1 you with executives with primary.

10:50:50 2 MR. VAN TINE: Right.

10:50:50 3 THE COURT: I thought the parsing was that.

10:50:52 4 MR. VAN TINE: Yes, it is.

10:50:54 5 THE COURT: Now it seems like they gave you more than

10:50:56 6 that.

10:50:58 7 MR. MOGIN: Well, we just learned that just now.

10:51:00 8 MR. MAROVITZ: Wait, Judge, if I could make the
10:51:02 9 record clear. If you look at tab 11, the time line, and you
10:51:08 10 turn to August 11th of 2011, it's page 2 of the letter that we
10:51:18 11 sent, middle of the page, you can see that there is an entry
10:51:24 12 that says, Temple-Inland produces corporate documents,
10:51:28 13 including organizational charts and certain financial
10:51:30 14 information and third-party analyst reports, about 51,000
10:51:36 15 Bates-labeled pages. So on the org charts, it just isn't the
10:51:42 16 case that they just recently received these.

10:51:44 17 Now, it is certainly true that they have recently
10:51:46 18 received a lot of documents. I agree.

10:51:50 19 THE COURT: Right.

10:51:50 20 MR. MAROVITZ: And I don't expect that they have been
10:51:52 21 through all those documents, but I want the record to be clear
10:51:54 22 about when we made productions of things.

10:51:58 23 MR. MOGIN: This is what makes it so difficult to
10:52:02 24 deal with Temple in particular, your Honor, is we can't seem
10:52:04 25 to have an apples-to-apples discussion. What has been

10:52:08 1 produced in the past were precisely the organizational charts,
10:52:14 2 the limited organizational charts, the primary decisionmakers,
10:52:18 3 the ones that were essentially uninformative.

10:52:22 4 So, yeah, that's true, but that's not the same thing
10:52:26 5 we were discussing a moment ago, which was the more
10:52:30 6 comprehensive document set.

10:52:32 7 THE COURT: All right. Outside stranger looking at
10:52:38 8 this, okay, for whatever it's worth, I thought the reason that
10:52:44 9 the defendants may have limited it to organizational charts of
10:52:50 10 those executives with primary decisionmaking may be that they
10:52:56 11 thought this will be the custodians in the case. And I didn't
10:53:02 12 even know Mr. Mogin was going to say what he said.

10:53:06 13 When I read it, I thought it was the way old-time
10:53:10 14 discovery was done down the road, as opposed to new kind of
10:53:14 15 transparency, like, Hey, Dan, what is it you really want? Do
10:53:20 16 you really need to see -- if I tell you organization primary
10:53:26 17 responsibility, if I tell you these people down here, that
10:53:28 18 doesn't mean I'm going to agree to documents. But in order
10:53:32 19 for him to know who it is, he might need to know both levels
10:53:40 20 of who the actors are and then jump to the next level of, Do I
10:53:44 21 get the stuff that backs it up. That's what I thought when I
10:53:48 22 read it the first time because, I mean, who the heck cares
10:53:54 23 about an organizational chart? It's probably on the Internet.
10:53:58 24 I mean, somewhere.

10:54:00 25 How could you be -- to me, as an outsider, how could

10:54:04 1 you be fighting about an organizational chart, I understand
10:54:08 2 all the -- I understand a lot of the other fights, unless I am
10:54:12 3 afraid the ESI started coloring things back when you didn't
10:54:18 4 know each other as well, when you didn't have systems in
10:54:20 5 place.

10:54:22 6 And so for me, who is trying to now come in a year
10:54:26 7 later, and not go to tons of briefing on things, if we could
10:54:32 8 agree to actually -- it doesn't mean if you give them an
10:54:36 9 organizational chart, they are going to turn into custodians.

10:54:40 10 Am I completely wrong?

10:54:42 11 MS. MILLER: No, but, your Honor, what I am saying is
10:54:44 12 -- and Mr. Mogin has the same ability to find the documents
10:54:46 13 that I did because he has the same metadata that I did, if he
10:54:50 14 returns a search in our prior production, we can find the
10:54:52 15 hundreds of --

10:54:52 16 THE COURT: I am not into indexing.

10:54:54 17 MS. MILLER: I understand.

10:54:54 18 THE COURT: I am literally --

10:54:56 19 MS. MILLER: I am saying in terms of finding what we
10:54:58 20 already produced, he can easily put his hands on -- I didn't
10:55:02 21 bring the stack with me, and I don't have the Bates range of
10:55:04 22 all the organizational charts that we produced because I
10:55:08 23 didn't bring that Bates range or that stack with me, but those
10:55:10 24 are easily found in the production we have already given.

10:55:12 25 And as I said, we gave, from the CEO down to some

10:55:16 1 salespeople and some people at the mill and plant manager,
10:55:18 2 notwithstanding that, as your Honor said, we don't believe
10:55:20 3 they are proper custodians, but we have given them a
10:55:24 4 significant amount of organizational information of people
10:55:26 5 within our containerboard and corrugation --

10:55:28 6 MR. MAROVITZ: Britt, real quick, can you just show
10:55:30 7 -- I know we're not talking about the pages, but can you show
10:55:32 8 the judge about how thick the org charts were that we
10:55:36 9 produced?

10:55:36 10 MS. MILLER: About that big.

10:55:38 11 MR. VAN TINE: Your Honor, apparently, it's not so
10:55:40 12 easy to find those. I asked someone to find them yesterday,
10:55:46 13 and over the weekend, and believe me, although there were a
10:55:52 14 few stray documents, and I mean few, handful of stray
10:55:56 15 documents that we could identify in the prior production, and,
10:56:00 16 yes, there's some unexplained document showing people in a
10:56:06 17 mill, for example, I have not -- I have not seen more than
10:56:14 18 probably 20 pages, if that.

10:56:18 19 THE COURT: Of organizational charts.

10:56:20 20 MR. VAN TINE: Yes. And a lot of it was -- and when
10:56:24 21 we talk about number of pages, we are talking about a mill
10:56:28 22 here, a mill there, and not a comprehensive organizational
10:56:38 23 chart and not a large amount of material. The only
10:56:46 24 comprehensive organizational chart that I have seen is a
10:56:56 25 single-page chart that's limited very much. And, actually, I

10:57:04 1 have marked this up for other reasons which we may get to
10:57:22 2 later. This is the one comprehensive document that I have
10:57:24 3 seen, and it is probably limited to decisionmakers, but --

10:57:34 4 THE COURT: That looks pretty comprehensive to me.

10:57:36 5 MR. VAN TINE: But many of them are, as shown on
10:57:42 6 here, not designated as custodians.

10:57:44 7 THE COURT: Custodians. Which is a different issue.

10:57:48 8 MR. VAN TINE: Yes.

10:57:48 9 THE COURT: I mean, you folks used requests to
10:57:54 10 produce in a way I have never seen it used before, as a
10:57:58 11 mechanism. Okay? I mean, it is -- I am not saying it can't
10:58:06 12 be done. I think maybe you're way ahead -- maybe you're way
10:58:10 13 ahead. But, typically, requests to produce are not as
10:58:16 14 comprehensive as you -- they sort of incorporate
10:58:20 15 interrogatories in a way, I mean, they kind of swoop
10:58:26 16 everything under the request to produce. So part of why we
10:58:32 17 were having a hard time getting our hands on it, it doesn't
10:58:34 18 fall into a category.

10:58:38 19 Now, that to me looks like a pretty darn good
10:58:40 20 organizational chart.

10:58:42 21 MR. VAN TINE: Except, your Honor, in an antitrust
10:58:46 22 case, a lot of salespeople become sources of information.

10:58:56 23 THE COURT: I bet they do.

10:58:58 24 MR. VAN TINE: And, for example, this single page
10:59:04 25 only lists vice presidents with sales responsibility. They

10:59:10 1 are not necessarily the people that are getting information
10:59:16 2 out in the field. And so, I mean, for example, when there was
10:59:20 3 a comment a few minutes ago about people in sales offices,
10:59:24 4 they can be important in antitrust cases and the sorts of
10:59:30 5 documents that they have and the information that they may
10:59:34 6 pass up from those documents, although perhaps without the
10:59:38 7 documents themselves, up to someone that becomes an ultimate
10:59:44 8 decisionmaker. I think -- when I think of a primary
10:59:50 9 decisionmaker, I think of the guy in the corner office --

10:59:56 10 THE COURT: Right.

10:59:56 11 MR. VAN TINE: -- that maybe he makes the decisions,
11:00:00 12 but he has a whole staff of people gathering information and
11:00:04 13 distilling it on his behalf. And it can be important to know
11:00:12 14 who all those people are and all the people that are likely to
11:00:16 15 have contacts who may be out in the field.

11:00:20 16 MR. MOGIN: Your Honor, if I may, request No. 1, yes,
11:00:26 17 we did ask specifically for organizational charts, but we also
11:00:30 18 asked for other documents. And what we are trying to get at
11:00:32 19 here is, how is the business organized? What are the
11:00:36 20 functional units within the company? That's what we're
11:00:42 21 looking for, the functional units within the company that have
11:00:44 22 some bearing upon this aspect of their business, whether it's
11:00:50 23 their board of directors' committees, because maybe the
11:00:54 24 committees have specific operating unit functions, whether
11:00:58 25 there are executives who form informal committees to deal with

11:01:02 1 specific issues, whatever. This is our attempt to understand
11:01:08 2 the organizational structure of the business. Our attempt to
11:01:12 3 understand the nature of the personnel who are involved in the
11:01:16 4 business is really more request No. 3. Request No. 3 is our
11:01:22 5 attempt to find out, if you go back to No. 9, that is
11:01:28 6 instruction No. 9, where we list out the various corporate
11:01:32 7 functions, it's our attempt to identify individuals that are
11:01:42 8 performing various types of functions, not just
11:01:46 9 decisionmakers, although decisionmakers are included, but who
11:01:48 10 are the people on the planning staff, who are the people who
11:01:50 11 handle the budgets, who are the sales personnel, et cetera.
11:01:52 12 That's all we asked for is a list of who those people are, not
11:01:56 13 primary decisionmakers. Who are the people that perform the
11:02:00 14 functions.

11:02:00 15 And if you like, your Honor, we have a collection of
11:02:02 16 cases that we'd be happy to submit to you where cases --
11:02:06 17 antitrust cases have gone off on the testimony or evidence
11:02:10 18 gathered from salespeople or from the strategic planning staff
11:02:14 19 or from people who are not primary decisionmakers. You have
11:02:20 20 heard me speak I don't know how many times about the masters
11:02:22 21 and Sherpa situation that was present in the ADM case, and we
11:02:28 22 tried in advance of this hearing to find for you the testimony
11:02:32 23 of Barrie Cox, who is the person who put that in in the
11:02:36 24 criminal trial and talked about how the top guys got together
11:02:40 25 and outlined the broad strokes of the conspiracy, but it was

11:02:44 1 left to the underlings, the Sherpas, to try and effectuate the
11:02:50 2 conspiracy and to keep the books and records necessary to
11:02:52 3 balance things out. So that went down. Those were the
11:02:56 4 Sherpas.

11:02:56 5 So we don't want to know just who the masters are.
11:03:00 6 We also want to know who the Sherpas are. I mean, there's
11:03:04 7 case after case after case talking about getting underneath
11:03:06 8 primary decisionmakers and understanding the business units
11:03:12 9 here. And you'll learn more about why the business unit
11:03:16 10 question became important when we talk about Georgia-Pacific
11:03:22 11 on Friday. But they couldn't have been more clear about
11:03:24 12 putting that entire issue into issue.

11:03:28 13 MR. MAROVITZ: Judge, if I can speak briefly in
11:03:30 14 response to this?

11:03:30 15 MR. VAN TINE: Can I just add one thing?

11:03:34 16 THE COURT: Sure.

11:03:34 17 MR. VAN TINE: Just before we lose that.

11:03:36 18 Here's an example of a vice president who would not
11:03:42 19 be considered an ultimate decision- -- primary decisionmaker
11:03:48 20 who is not on that organizational chart that I just handed to
11:03:54 21 you. He is the trade association liaison for the company and
11:03:58 22 he apparently has been for perhaps 22 years. Trade
11:04:04 23 associations are very important in antitrust cases, yet, you
11:04:12 24 know, this person does not appear on the organization chart,
11:04:18 25 he is not a custodian, he is not a primary decisionmaker. And

11:04:24 1 this is why we need -- this is an example of someone that is
11:04:26 2 high up in the company that would fall through the cracks.

11:04:32 3 MR. MAROVITZ: Judge, if I could briefly respond to
11:04:34 4 all that.

11:04:34 5 The org chart that we have been looking at you can
11:04:38 6 see is Bates stamped Temple-Inland, lots of zeros, and then 1.
11:04:44 7 It was actually the first document that we produced in the
11:04:46 8 case. We produced it informally. I went to Mike Freed's
11:04:54 9 office in Bannockburn and sat down with Mr. Freed and over the
11:04:58 10 phone with Mr. Mogin and talked through the organization. And
11:05:00 11 then we later produced it, I am doing this from memory, but I
11:05:06 12 believe 16 or 17 months ago by email.

11:05:10 13 This is only one organization chart. As Ms. Miller
11:05:16 14 pointed out, we produced many more. So to suggest that there
11:05:22 15 is one person who doesn't appear on this one page doesn't
11:05:24 16 really say much about the organization charts we have
11:05:28 17 produced.

11:05:28 18 Now, we have told -- I don't want this to turn into a
11:05:32 19 custodian issue any more than you do, but we have told --

11:05:34 20 THE COURT: Well, part of why I was doing what I was
11:05:38 21 doing was by Monday night, I was sort of saying to myself, is
11:05:48 22 this really about a damn organizational chart, or is it really
11:05:54 23 about something else, which is what I was trying to get to. I
11:05:58 24 mean, that's what I'm saying. Is it really about custodians?

11:06:04 25 And so I am not taking stuff off the table, but first

11:06:06 1 I'm trying to figure out what, in fact, they got, okay,
11:06:14 2 because reading their response, I did not -- I thought it was
11:06:16 3 limited to these people with this executive responsibility,
11:06:22 4 and either Temple-Inland, I'm sure, is a democratic place that
11:06:28 5 lets a lot of people make decisions --

11:06:30 6 MR. FREED: Your Honor, may I make a broader point,
11:06:34 7 because I think we are getting to a very, very important major
11:06:36 8 point that somehow got diverted because you thought that
11:06:40 9 document request No. 1 might illustrate the issue.

11:06:42 10 The way that Mr. Marovitz and Ms. Miller have
11:06:48 11 described the situation is they have redefined our request for
11:06:52 12 production, they have made a search, and they have produced
11:06:54 13 the documents which have been responsive to that search;
11:06:58 14 whereas, if they had pursued it, as Mr. Marovitz says he
11:07:04 15 doesn't usually do it, which is the way I've always seen it
11:07:08 16 done, the reason the objections are made is not to withhold
11:07:10 17 the production of the documents, it is to maintain the
11:07:12 18 objection for the documents that are produced.

11:07:16 19 But by making the cut on the basis of I object to
11:07:20 20 these documents, I will not produce them, I will not search
11:07:24 21 them, we have no idea whether the relevant materials are
11:07:26 22 actually being reviewed and searched. And it's really I think
11:07:32 23 a cutting edge issue here. Do you redefine a request for
11:07:36 24 production and say, This is how I redefined it and this is
11:07:40 25 what I am going to produce and this is what I am going to

11:07:42 1 search; or do you say I will review the corpus of documents
11:07:48 2 where there are some as to I have an objection because I think
11:07:52 3 this person is too low in the organization or I think it's
11:07:56 4 outside the time frame, I'm going to reserve all my objections
11:07:58 5 but I'm going to produce it? And that's how I have always
11:08:00 6 understood the production.

11:08:02 7 Now, when Mr. Marovitz refers to our answer to 16 as
11:08:06 8 illustrative of our support of his position -- you brought the
11:08:12 9 downstream discovery.

11:08:12 10 MR. MAROVITZ: That's part of 16, yes.

11:08:18 11 MR. FREED: So that's a whole separate issue. Cases
11:08:20 12 are legion that in a direct purchaser case, the defendants are
11:08:22 13 not entitled to downstream discovery, and that's what was at
11:08:26 14 issue there. And that was the only reason in that particular
11:08:30 15 response we took that position that we are not going to
11:08:32 16 produce it.

11:08:32 17 But with everything else, you can't -- as we see it,
11:08:36 18 you can't just say, This is what you've asked for, this is
11:08:38 19 what we think you are entitled to, and this is what we are
11:08:42 20 going to produce, because it just cuts out of the production
11:08:44 21 potentially very important material.

11:08:48 22 MR. MAROVITZ: I respectfully disagree with Mr. Freed
11:08:50 23 on that. We could have -- as your Honor I think understood,
11:08:52 24 we could have in June of 2011 said, We believe your requests
11:08:58 25 are overly broad, we think you're asking for far too much in

11:09:02 1 terms of scope and people, it's your duty as the plaintiffs to
11:09:06 2 give us requests that are not overly broad, we are going to
11:09:10 3 object, and we are not going to produce anything. We could
11:09:12 4 have done that.

11:09:14 5 THE COURT: Right.

11:09:14 6 MR. FREED: But then --

11:09:16 7 MR. MAROVITZ: Let me finish, Mike.

11:09:18 8 MR. FREED: Sorry.

11:09:18 9 MR. MAROVITZ: We did not do that. Instead, we made
11:09:20 10 the objections and we said, Here's what we think you're really
11:09:24 11 entitled to, and with specificity we said, Here's what we're
11:09:26 12 going to produce. That's what we did.

11:09:28 13 THE COURT: And if we were playing according to the
11:09:30 14 old rules, which we are not --

11:09:32 15 MR. FREED: You would have decided that issue.

11:09:34 16 THE COURT: No, or they could have done it that way,
11:09:40 17 or you could have come in on a motion to compel, complete
11:09:42 18 answers to the request to produce. Now, we are not doing the
11:09:46 19 blame -- we are not doing numbers and we are not doing blame.

11:09:48 20 MR. FREED: No, I am not trying to do the blame.

11:09:52 21 THE COURT: And both of you, because I think you were
11:09:54 22 in a new mode of trying to work it out. Okay? I do. I
11:09:58 23 believe that, Mr. Freed. I think we have got, you know, this
11:10:02 24 new way that I 100 percent support.

11:10:10 25 So we have now spent one hour on what constitutes an

11:10:12 1 organizational chart.

11:10:16 2 MR. FREED: But it goes to the bigger issue.

11:10:16 3 THE COURT: But it's good, but it's good, because it
11:10:20 4 is helping. Okay? It is helping me to kind of get inside
11:10:26 5 your head here. Okay? And I thought they only gave you high
11:10:30 6 level executives.

11:10:32 7 Now, your question had two parts to it, which is one
11:10:38 8 of the things I see running through a lot of these. One is,
11:10:44 9 Give me the organizational chart, and the other is, Give me
11:10:48 10 all the documents that go with it, which are kind of, you
11:10:52 11 know, what the heck does that mean? So the broader you go on
11:10:58 12 the organizational chart, therefore, you're committing to more
11:11:00 13 documents. The narrower the organizational chart, the
11:11:10 14 narrower would be the document production.

11:11:12 15 So there is kind of a complication here that it's not
11:11:20 16 just organizational charts.

11:11:20 17 MR. FREED: I think there is a fundamental
11:11:22 18 misunderstanding. It's not a blame game.

11:11:24 19 THE COURT: Good.

11:11:24 20 MR. FREED: I thought, and Mr. Mogin thought, based
11:11:26 21 on my experience, which is even longer, maybe not better, but
11:11:30 22 longer than Mr. Mogin's, that when the documents are produced
11:11:34 23 subject to objections, it doesn't mean that the documents are
11:11:38 24 culled and nothing that is objectionable is produced. I
11:11:42 25 thought it meant and have always thought it meant that -- and

11:11:46 1 I believe it's been the case -- that they are produced with
11:11:48 2 all objections maintained for purposes of evidence so that if
11:11:52 3 you attempt to use a document which has been produced subject
11:11:54 4 to objection, the defendant hasn't waived the objection in
11:11:58 5 terms of use of the document.

11:12:00 6 THE COURT: When I read that in your statement, I
11:12:02 7 have not seen that in 14 years. I haven't. I haven't. I
11:12:06 8 have not seen -- because, you know, this building, federal
11:12:10 9 courts across the country, are so -- you know, I mean, our
11:12:16 10 bread and butter are motions. So every single time somebody
11:12:20 11 doesn't like something or they don't understand it or they
11:12:24 12 don't usually talk about it, they run into the judge and say,
11:12:28 13 Give me or don't give me; either, Give it to me or don't let
11:12:32 14 them have it.

11:12:34 15 So I haven't seen this we'll turn them over. It
11:12:40 16 seems kind of counter-intuitive once kind of the cat is out of
11:12:46 17 the bag. Once you see the documents, I don't know --

11:12:50 18 MR. FREED: Because the documents may be relevant or
11:12:52 19 lead to the discovery of relevant material because that's the
11:12:54 20 broad scope of Rule 26.

11:12:58 21 THE COURT: Well, I understand. I do understand
11:13:00 22 that. But I have people all the time where I'm having to
11:13:02 23 order -- I could give you way too many opinions on where I
11:13:08 24 have had to either order or stop the production.

11:13:12 25 MR. FREED: I mean, we may reach a point where we

11:13:16 1 have to come in on motion then, if that's going --
11:13:20 2 THE COURT: That's why this could take us 90 hours.
11:13:24 3 This could take us 90 hours to do the requests to produce.
11:13:28 4 MR. MOGIN: Only 60.
11:13:30 5 THE COURT: Well, no. So now I am going to figure,
11:13:32 6 Is it better for me to give it to Chris to do, or is it better
11:13:36 7 if I sit in the courtroom and you guys -- we are going to
11:13:44 8 figure this out. Okay.
11:13:48 9 I have never seen an example of people who gave them
11:13:50 10 the documents -- I mean, I certainly have seen examples of
11:13:54 11 interrogatories where you object and then you go ahead and
11:13:56 12 answer it. And I don't know, everything in discovery is on
11:14:00 13 trust. I'm assuming when they answer it, it's a full answer.
11:14:04 14 Maybe I will now look at it a different way after this. I
11:14:08 15 have seen that much more in interrogatories than I have in
11:14:12 16 requests to produce.
11:14:12 17 MR. FREED: See, I think it's exactly the same. I
11:14:16 18 think it's exactly the same.
11:14:16 19 THE COURT: I know that's your position.
11:14:18 20 MR. FREED: Let's assume that we were incorrect,
11:14:20 21 because there's certainly two possibilities, we were right or
11:14:26 22 we were wrong, we still don't have the material, we still
11:14:30 23 don't know what they held back based on their unilateral
11:14:34 24 determination that's not responsive and their redefinition of
11:14:36 25 interrogatory, and that's why we are -- we don't know what's

11:14:40 1 behind the curtain.

11:14:40 2 THE COURT: Well, no. See, I think now, you know, I
11:14:46 3 could -- now that I understand that, A, you want the charts
11:14:54 4 and, B, you want the documents to go with it. So we could
11:15:00 5 probably get you -- but then what you don't know is which
11:15:04 6 documents go with any of these people, as I understand it.

11:15:08 7 I mean, now, Britt is going to save us all because
11:15:12 8 she is going to tell us something that I have been afraid to
11:15:18 9 admit that I don't understand what she is talking about how
11:15:22 10 metadata ties it all in, but maybe she can tell us how we can
11:15:26 11 do it through the metadata, maybe.

11:15:30 12 MR. MOGIN: Do what through the metadata?

11:15:32 13 THE COURT: How you can identify which document goes
11:15:34 14 with which person through the metadata chain.

11:15:40 15 MR. FREED: That only solves half the problem.

11:15:42 16 MR. MOGIN: That's a different issue, your Honor,
11:15:44 17 because we still don't know what they produced. The metadata
11:15:46 18 only applies to what's been produced.

11:15:50 19 THE COURT: All right. Let me ask it another way.

11:16:00 20 Would you produce -- of this organizational chart,
11:16:06 21 when you were doing your document production, how far do you
11:16:10 22 go down -- forget about if you can tie it to a person. How
11:16:14 23 far does your document production go on this organizational
11:16:18 24 chart?

11:16:20 25 MS. MILLER: Well, with respect to the documents

11:16:22 1 belonging to the people represented, I'm looking -- I haven't
11:16:26 2 verified all of Mr. Van Tine's check marks, but assuming that
11:16:30 3 he is correct, if there is a check mark next to these people,
11:16:32 4 so starting with Doyle Simons (phonetic) at the CEO down to
11:16:36 5 the sales executives, Wayne Vanderberg, Erin Copeland
11:16:38 6 (phonetic) --

11:16:38 7 THE COURT: Anybody with a check mark?

11:16:40 8 MS. MILLER: Yeah.

11:16:42 9 MR. VAN TINE: Well, the check, just to be clear what
11:16:44 10 I did here, all I have done is compare their stated list of
11:16:50 11 custodians to people on this chart and given them check marks.
11:16:56 12 The people with Xs are people that would seem to certainly
11:17:02 13 have some interest that are not listed as custodians. And
11:17:08 14 although we are talking about this in terms of the
11:17:12 15 organization chart issue, this issue about primary
11:17:16 16 decisionmakers runs through many of the ones --

11:17:20 17 THE COURT: It does.

11:17:22 18 MR. VAN TINE: -- that we have before the court.

11:17:22 19 THE COURT: Right.

11:17:24 20 MR. VAN TINE: So it's not just an organization chart
11:17:26 21 issue.

11:17:48 22 THE COURT: So the check mark is the plaintiff --
11:17:50 23 that's your check mark.

11:17:52 24 MR. VAN TINE: Yes. I added check marks --

11:17:54 25 THE COURT: That's really helpful.

11:17:56 1 MR. VAN TINE: -- in the commentary in the boxes.
11:17:58 2 MS. MILLER: And to be clear, this is one of the
11:18:00 3 organizational charts we produced. There are other
11:18:02 4 custodians. We have a total of 28 custodians, all of whom are
11:18:06 5 on this one sheet. The majority of them are on this one
11:18:08 6 sheet, but there are additional custodians that are on other
11:18:14 7 organizational charts that are being produced as well.

11:18:16 8 THE COURT: Okay. Well, for the future, I think one
11:18:22 9 of the things happened is a statement that says, Complete
11:18:30 10 organizational structure directly or indirectly relating to
11:18:34 11 container products. That is rather broad. And then you're
11:18:38 12 kind of, you know, answering back, We're giving you executives
11:18:44 13 with primary decisionmaking authority, that kind of took it
11:18:50 14 from so broad over here and to executives with primary -- I
11:18:56 15 mean, I know you have to answer it some way, but that somewhat
11:19:00 16 made it like a polar --

11:19:04 17 MS. MILLER: Well, we said we would give primary
11:19:06 18 decisionmaking and those people that reported directly to
11:19:08 19 them.

11:19:08 20 THE COURT: To them, yes.

11:19:10 21 MR. MOGIN: What's wrong with identifying the other
11:19:12 22 organizational structures within the company, identify -- we
11:19:18 23 are not talking about producing by custodian or anything like
11:19:22 24 that.

11:19:24 25 THE COURT: Do you think we could have that?

11:19:24 1 MS. MILLER: Perhaps I am not understanding, but I
11:19:26 2 don't know that there are documents that reflect any internal
11:19:30 3 organization in terms of informal committees that may have met
11:19:36 4 or anything else that would give the kind of information that
11:19:38 5 Mr. Megin is asking. We have produced a lot of organizational
11:19:40 6 charts that show the people within our corrugated packaging
11:19:46 7 group. The only other group in the company is building
11:19:48 8 products, which is a completely different product group that
11:19:52 9 has nothing to do with this litigation.

11:19:52 10 So we are -- we have produced the organizational
11:19:54 11 charts that show all the people in our corrugated packaging
11:19:58 12 group.

11:20:00 13 MR. MOGIN: So that the word index for Temple-Inland
11:20:02 14 won't have the word "committee" or any derivation of that?

11:20:08 15 THE COURT: Well, no --

11:20:08 16 MS. MILLER: I'm sorry. I don't even understand the
11:20:14 17 question.

11:20:14 18 MR. FREED: Planning committee, would that be in your
11:20:18 19 index?

11:20:18 20 MR. MOGIN: So if I go to your word index and I
11:20:22 21 search for the word committee or derivations of the word
11:20:26 22 committee, are you suggesting that those won't be found?

11:20:28 23 MS. MILLER: No, I'm not suggesting that at all.

11:20:30 24 MR. MOGIN: Precisely. So that would indicate that
11:20:30 25 there are committees. And if there are committees and if the

11:20:34 1 word committee appears in the word index, that means that
11:20:38 2 there are documents that discuss those committees.

11:20:40 3 MS. MILLER: There could be any number of documents
11:20:42 4 that discuss any number of committees that have nothing to do
11:20:46 5 with the organizational structure you are seeking.

11:20:48 6 MR. MOGIN: I am asking if you maintain committees.
11:20:50 7 Are there committees that are relevant to the operation of
11:20:54 8 this business?

11:20:56 9 THE COURT: What you had said before was -- what
11:21:02 10 Mr. Megin said before was informational committees or board of
11:21:10 11 directors that might have committees. But, truthfully, how
11:21:14 12 would you get that out of this question here?

11:21:18 13 MR. MOGIN: Actually, your Honor, this one is a
11:21:22 14 pretty standard question that comes out of the Department of
11:21:24 15 Justice manual.

11:21:26 16 THE COURT: Okay. Is that, now that you know
11:21:36 17 everything that you know and a year later, is that something
11:21:40 18 you feel like you need is more information about the committee
11:21:44 19 structure?

11:21:46 20 MR. MOGIN: Yes, because the committee structure will
11:21:48 21 tell us about the decisionmaking structure.

11:21:52 22 THE COURT: Okay. Am I being Pollyanna? Doesn't it
11:22:04 23 seem like we have sort of -- the committee structure seems to
11:22:10 24 be another layer. Is there any other problem the plaintiffs
11:22:14 25 have with this other than if there is a committee structure?

11:22:18 1 Is there any other problem that you have been able to
11:22:20 2 identify?

11:22:24 3 MR. MOGIN: Not that we have been able to identify,
11:22:26 4 but the whole function here is identification of the
11:22:30 5 organizational structure.

11:22:34 6 THE COURT: Well, no, but, I mean, could you start
11:22:38 7 taking deps? Could you write interrogatories? I mean, isn't
11:22:42 8 that what the next step is? You haven't done any
11:22:46 9 interrogatories, right?

11:22:46 10 MR. MOGIN: Just to Georgia-Pacific, and I don't
11:22:48 11 think that you would allow 10,000 interrogatories.

11:22:50 12 THE COURT: I am not. I am not.

11:22:58 13 MR. FREED: To answer a question or make a comment on
11:23:00 14 something you said earlier, the reason in antitrust cases in
11:23:04 15 particular you use the request for production as the driving
11:23:06 16 vehicle is 90 times out of a hundred, the answer to the
11:23:10 17 interrogatories seek production.

11:23:10 18 THE COURT: I see. I see. I didn't know that. I
11:23:14 19 didn't know that.

11:23:14 20 MR. FREED: It was really typical -- and I think
11:23:18 21 Mr. Marovitz would agree with that, that is typically how it's
11:23:22 22 done. So interrogatories are an enormous amount of time and
11:23:24 23 don't get you any further than a reference.

11:23:28 24 Now, they do have one advantage in retrospect is
11:23:32 25 maybe that would be the functional equivalent of an index,

11:23:34 1 which would give us some kind of response to that kind of an
11:23:36 2 interrogatory directing it to production. But, typically, you
11:23:40 3 don't spend a lot of time on interrogatories in these cases.

11:23:42 4 MR. VAN TINE: But the important thing in an
11:23:44 5 antitrust case are the documents, which we are beginning to
11:23:50 6 get, and they drive the depositions.

11:23:52 7 But circling back to this request, you know, if I am
11:23:56 8 looking at an email string and it's got 10 people on it, I'd
11:24:04 9 like to know who those people are, and they may not all be
11:24:08 10 primary decisionmakers.

11:24:10 11 THE COURT: But isn't that the problem right now? I
11:24:14 12 mean, this basic tension that's going on, the defendants feel
11:24:20 13 like they are doing nothing but giving, giving, giving, and
11:24:24 14 you guys haven't -- you know, you haven't had enough time to
11:24:28 15 receive and review.

11:24:34 16 MR. MOGIN: But they are giving what they want to
11:24:36 17 give, not what we have asked for.

11:24:38 18 THE COURT: Well -- or what they have been ordered
11:24:40 19 to.

11:24:40 20 No, I mean, I hope you're not so -- but they need
11:24:56 21 from you -- and I don't know how to factor this in timewise
11:25:00 22 because you have to review some of the stuff first to be able
11:25:02 23 to say what you just said. Look at the five people on this
11:25:06 24 email here. This is important. But I am not -- I am going to
11:25:10 25 give you as much time as it took them to put the materials

11:25:16 1 together to review the materials, which is the reason I was
11:25:20 2 suggesting phasing and not cutting people off. I don't even
11:25:26 3 know here and why I am telling Mr. Marovitz he hasn't wasted
11:25:32 4 any time because this was the first round of these things.
11:25:40 5 Not the first round, but kind of the first pass-through here,
11:25:44 6 and then we would see -- because I don't care if you have 20
11:25:50 7 people in your office looking at all this stuff. Your lead
11:25:56 8 lawyers still have to have time to absorb it. A computer can
11:26:00 9 only do so much. You can feed all the junk into it, but then
11:26:04 10 you've got to be able to do the analysis of what's important.

11:26:14 11 So something on an interim level here would be after
11:26:30 12 a discussion, say, of this discussion, if you were to go back
11:26:34 13 or I were to say, if you want me to do it with Ms. Miller and
11:26:38 14 talk to her, if she could come back with a committee
11:26:42 15 structure. And, you know, we now know enough about language,
11:26:46 16 whether you call it committee or whatever the synonyms for
11:26:50 17 committee is, whatever -- you know, however Temple-Inland, if
11:26:54 18 she can go back and figure out -- it sounds like that's
11:27:00 19 different than a trade association or a lobbyist. I mean,
11:27:04 20 these are internal committees you're looking for?

11:27:08 21 MR. MOGIN: Precisely.

11:27:08 22 THE COURT: That's what you're looking for?

11:27:10 23 Ms. Miller and Mr. Marovitz have been in as many
11:27:14 24 antitrust cases as you guys have been. Is this something
11:27:16 25 that's kind of normal in companies asking for this committee

11:27:20 1 or whatever they call them?

11:27:24 2 MR. MAROVITZ: Have you seen it?

11:27:26 3 MS. MILLER: No.

11:27:28 4 THE COURT: I mean, it's logical what they are saying
11:27:30 5 if the committees are --

11:27:30 6 MR. MAROVITZ: Organizational charts certainly are
11:27:34 7 relevant in antitrust cases.

11:27:36 8 THE COURT: And you have done that.

11:27:38 9 MR. MAROVITZ: We have done that. Not just in this
11:27:40 10 case, but in other cases.

11:27:42 11 I don't know -- I can't recall specifically being
11:27:44 12 asked about committee structures internal to a party. I am
11:27:48 13 not saying that makes it right or wrong.

11:27:52 14 MS. MILLER: It usually comes out in depositions, you
11:27:54 15 know, did you meet with anybody on a regular basis.

11:27:58 16 MR. FREED: But you want to know there was a planning
11:28:00 17 committee, a strategic committee, and to get those documents
11:28:02 18 for the committees before the deposition. That's the whole
11:28:06 19 thing. It has to be efficient.

11:28:06 20 MR. MAROVITZ: Judge, I don't mind having this
11:28:08 21 conversation at all. I do not want our silence on this to
11:28:12 22 somehow suggest that there are 15 different committees at
11:28:14 23 Temple-Inland. I suspect that that's not the case at all.

11:28:20 24 THE COURT: I am not also taking your silence as
11:28:24 25 you're agreeing to do this either. I mean, we are having a

11:28:28 1 discussion. We are basically having a discussion.

11:28:30 2 MR. MAROVITZ: Sure.

11:28:30 3 THE COURT: I am saying to Mr. Mogin, if we basically
11:28:34 4 were able to figure out the committee structure that doesn't
11:28:40 5 get us to how does he know which document goes with which
11:28:42 6 level here, I understand that, but would that move it along on
11:28:48 7 the first level of -- for Temple if we knew who the -- if
11:28:54 8 there was a committee structure, and then you want to know
11:28:58 9 which of these folks are on which committee?

11:29:02 10 MR. MOGIN: Of course.

11:29:02 11 THE COURT: Of course. Okay.

11:29:06 12 MR. MAROVITZ: And, Judge, can I just interject real
11:29:08 13 quickly? We may not be the perfect defendant to have this
11:29:12 14 conversation as the guinea pig, and the reason for it is this.
11:29:18 15 As was reported publicly a while ago and also as was reported
11:29:24 16 at the last status, we have been acquired by International
11:29:28 17 Paper.

11:29:30 18 THE COURT: I forgot that.

11:29:32 19 MR. MAROVITZ: Yes. So we are in a slightly
11:29:34 20 different position. There may be some other defendants in
11:29:38 21 terms of getting information of this sort. I'm not saying you
11:29:44 22 can't get it. I'm just saying it's -- sometimes as a result
11:29:46 23 of that, it makes it more cumbersome. So that has nothing to
11:29:52 24 do with preservation or anything else. It's just the people
11:29:56 25 who used to be running our company just in some respects

11:30:02 1 aren't there anymore.

11:30:04 2 THE COURT: They are not -- they didn't go over to --

11:30:06 3 MR. MAROVITZ: Some have, some have not.

11:30:08 4 THE COURT: Okay.

11:30:08 5 MR. MAROVITZ: So it makes it more of a challenge.

11:30:18 6 MR. MOGIN: Respectfully, your Honor, I'm surprised

11:30:20 7 to hear Mr. Marovitz say that. We have had a number of

11:30:24 8 discussions about the preservation and our ability to get

11:30:26 9 documents and to deal with this situation of the acquisition,

11:30:32 10 and we have been basically told on each occasion, don't worry

11:30:36 11 about it, it's not going to impede discovery here.

11:30:40 12 MR. MAROVITZ: I don't think that's quite what I

11:30:42 13 said. We have not --

11:30:44 14 THE COURT: Would you like to be off the record?

11:30:46 15 MR. MAROVITZ: No, I think I'd like to be on the

11:30:48 16 record.

11:30:52 17 We have done our very best with respect to our

11:30:56 18 preservation obligations and will continue to do that. What I

11:31:00 19 am saying is that as a matter of practice, it is more

11:31:02 20 challenging to get information from folks who are no longer

11:31:10 21 with the company. That has nothing to do with preservation or

11:31:14 22 obtaining documents or anything else.

11:31:16 23 MR. MOGIN: I understand what you're saying. I just

11:31:20 24 wasn't sure that it was consistent with what had been said

11:31:22 25 before about the effect of the acquisition on discovery, and

11:31:28 1 we received a number of representations about that.

11:31:32 2 MR. MAROVITZ: I think those representations were
11:31:34 3 accurate.

11:31:34 4 MR. MOGIN: I hope so. I sincerely do hope so.

11:31:38 5 THE COURT: Well, that's what he knew at the time he
11:31:42 6 made them. I mean --

11:31:42 7 MR. MOGIN: I mean that for all concerned.

11:31:44 8 THE COURT: -- I make statements all the time to
11:31:46 9 people, and it's what I know at the time I make it.

11:31:54 10 MR. MOGIN: Well, the reason I bring that up, your
11:31:56 11 Honor, is it's standard practice to seek some sort of
11:32:00 12 representation of that type when there is an acquisition in
11:32:04 13 these cases. And if we are unable to get the representation
11:32:08 14 that we are comfortable with to seek some kind of protective
11:32:12 15 order from the court so that the integrity of the information
11:32:14 16 isn't lost through the acquisition process. And we received
11:32:18 17 that -- those representations here and thought that they were
11:32:22 18 sufficient so that we would be able to avoid involving the
11:32:26 19 court in issuing a protective order.

11:32:30 20 But if I'm hearing something different, I just want
11:32:34 21 to be crystal clear so that if I have to go back and
11:32:38 22 reconsider the motion, that I have full information.

11:32:42 23 MR. MAROVITZ: Judge, I think we are way off track
11:32:44 24 here. Let me give you a for example. We started this
11:32:50 25 conversation by whether or not there were committees that we

11:32:52 1 could provide to them. So if that request had come a couple
11:32:58 2 years ago, there are certain people on this chart, maybe more
11:33:02 3 than one person, who I could talk to easily about finding out
11:33:06 4 about the existence of committees. That has nothing to do
11:33:10 5 with preservation.

11:33:12 6 Many of the people on the chart that we have provided
11:33:14 7 are former employees now, so it's frankly harder to get their
11:33:18 8 attention. It has nothing to do with representations or
11:33:22 9 preservation or anything else. I'm just not sure how we got
11:33:28 10 on that topic.

11:33:28 11 MR. MOGIN: You brought it up.

11:33:30 12 MR. MAROVITZ: I did not.

11:33:30 13 THE COURT: No, he didn't. No, he didn't, Mr. Megin.
11:33:32 14 He said that he was answering, and you know a lot more about
11:33:36 15 the case than I know because of your private conversations,
11:33:40 16 and I think that, you know, your concerns -- well...

11:34:00 17 MR. MAROVITZ: Let me suggest this, Judge.

11:34:08 18 THE COURT: I have so many more topics we have to
11:34:10 19 talk about. I mean, we have many more things to talk about.
11:34:14 20 I was hoping we were going to be able to -- I mean, in some
11:34:18 21 ways, this is the hardest topic because it's so large and it
11:34:24 22 has so many moving parts to it. And I don't think it should
11:34:34 23 necessarily be the judge who is -- or the mediator who is
11:34:40 24 bringing up the topics. I mean, part of it is I think you
11:34:42 25 know your case better.

11:34:46 1 Would you like to suggest we just kind of put this on
11:34:50 2 hold for a moment and do you want to talk about a different
11:34:54 3 topic? Why don't we do that.

11:34:56 4 MR. MOGIN: I think the next topic that makes sense
11:35:00 5 to talk about is No. 3.

11:35:00 6 THE COURT: Which is?

11:35:02 7 MR. MOGIN: No. 3 is our request for identification
11:35:04 8 of who are the individuals -- it's our attempt to get an
11:35:10 9 understanding of who might be the proper custodians.

11:35:12 10 THE COURT: I'm sorry?

11:35:12 11 MR. MOGIN: It's our attempt to get an understanding
11:35:14 12 of who might be the proper custodians and who might be the
11:35:18 13 information sources. And one of the reasons that it's
11:35:24 14 particularly important, and I know this may seem a little off
11:35:26 15 track, but remember that in this particular case or cases like
11:35:32 16 this, your Honor, email is the primary communications
11:35:38 17 methodology, and Temple-Inland, like many of the other
11:35:40 18 companies involved in this case, has a highly restrictive
11:35:46 19 email policy, including there is a certain amount of loss of
11:35:52 20 former employee email.

11:35:56 21 So we really need to know who are the individuals
11:36:02 22 that were in these particular positions during the relevant
11:36:08 23 time period so that if we have to undertake our own efforts to
11:36:12 24 locate them, we can.

11:36:16 25 And on that, let me show -- this is a little

11:36:18 1 demonstrative that we have created, but it comes from the
11:36:20 2 deposition, the 30(b)(6) deposition. There's Temple-Inland's
11:36:26 3 what we have called an aggressive policy for email
11:36:30 4 destruction.

11:37:02 5 So that's the background that we are dealing with.
11:37:06 6 That's one of the reasons that we -- it underlies many of the
11:37:14 7 positions that we have taken with respect to search
11:37:16 8 methodology. And a lot of the other issues there is what we
11:37:18 9 considered to be very aggressive email destruction policy.

11:37:22 10 Now, going to request No. 3, it's another little
11:37:30 11 demonstrative that we have here, and this will show you
11:37:32 12 precisely what's been asked for. So here we are just asking
11:37:50 13 for, identify for us the people who performed, the
11:37:52 14 individuals, or give us the documents that show who are the
11:37:54 15 individuals that performed various tasks. And, for example,
11:38:00 16 here, management, planning staff, sales personnel, ESI
11:38:08 17 personnel, and paper document archive personnel are all
11:38:12 18 defined terms. And you can go back to instruction No. 9 in
11:38:16 19 the RPDs and see precisely what those definitions are.

11:38:20 20 So for each of the people, give us whatever you can,
11:38:24 21 their names, their titles, what they did in the organization,
11:38:30 22 job descriptions, business affiliations, which would tie back
11:38:32 23 to trade associations, it might tie back to committees, et
11:38:38 24 cetera, and give us their contact information, and let us know
11:38:42 25 who worked with them in terms of the administrative support.

11:38:46 1 So that's what we have asked for. And Temple says,
11:38:48 2 We won't give you that. We are back to primary decisionmakers
11:38:52 3 and their direct reports. So that means that we don't get to
11:39:00 4 figure out who their salespeople are or may be, who is the
11:39:04 5 management, who is the planning staff, who are the proper ESI
11:39:06 6 personnel, and who might be the actual custodians or
11:39:12 7 archivists with respect to their paper documents.

11:39:18 8 And it even gets down to the point where we wouldn't
11:39:22 9 know who within the organization was tasked with gathering the
11:39:28 10 market information that's so relevant to the case.

11:39:34 11 So on the one hand, going back to No. 1, we have a
11:39:38 12 very restricted structure. Now we go to No. 3 and we have a
11:39:44 13 very much restricted set of information about the individuals.

11:39:58 14 Again, this is identification stuff. There is no
11:40:02 15 doubt that we are entitled to this information. There is no
11:40:04 16 excuse for refusing to give us the business affiliation and
11:40:08 17 contact information. I mean, that's just black letter law.
11:40:12 18 It's been that way for God knows how long.

11:40:26 19 MS. MILLER: Your Honor, let me know when you'd like
11:40:28 20 us to respond.

11:40:28 21 THE COURT: I am ready.

11:40:30 22 MS. MILLER: Okay. First, with respect to their
11:40:32 23 first demonstrative, this is not a full and accurate
11:40:34 24 recitation of Mr. Dunn's deposition testimony, but I'm not
11:40:38 25 sure that that's relevant for purposes of this discussion.

11:40:42 1 Things that are not X'd, there was a 60-day deletion feature
11:40:48 2 in there for any email that wasn't accessed within 60 days, so
11:40:52 3 most emails were not destroyed after 74 days. And we have
11:40:56 4 produced a ton of email from years -- more than 74 days ago
11:41:00 5 that were not deleted, thousands and thousands of emails, so
11:41:02 6 this is not exactly a -- it's an overly simplistic recitation
11:41:06 7 of a single policy and doesn't necessarily reflect how it was
11:41:10 8 employed or how actually it was implemented with respect to
11:41:12 9 Temple-Inland's email.

11:41:14 10 With respect to RPD No. 3, again, here it is -- they
11:41:20 11 have accurately written what their requests are. And this is
11:41:24 12 somewhat indicative of kind of all of their requests. Under
11:41:30 13 plaintiffs' theory as their RPDs are drafted, they essentially
11:41:34 14 want Temple-Inland to identify virtually every single person
11:41:36 15 in their organization, period, and produce every single
11:41:40 16 document that belongs to every one of those people within our
11:41:42 17 organization. That's a theme that kind of goes throughout all
11:41:46 18 of the RPDs.

11:41:48 19 We -- again, going to the point of we are producing
11:41:50 20 the people, and as indicated on the organization chart, we are
11:41:56 21 identifying the people that have the ability to make the
11:42:00 22 decisions to participate in and carry out the conspiracy that
11:42:04 23 is alleged by plaintiffs, but we were not providing people --
11:42:08 24 planning staff, if you look at our actual objection, we
11:42:12 25 objected to a lot of the terms that they said, saying, you

11:42:14 1 know, As drafted, this request purports to require
11:42:18 2 Temple-Inland to identify each and every affiliation or
11:42:20 3 business relationship of dozens and dozens of people.

11:42:24 4 Similarly, the term "contact information," if they
11:42:26 5 want to contact, you know, an existing employee, they come to
11:42:30 6 us. If they want to talk to somebody else and they are not an
11:42:34 7 existing employee, we can talk about those things, but to
11:42:36 8 download our entire HR files and give everybody's home email
11:42:40 9 and home address and home telephone number, it was an attempt
11:42:46 10 by us to put a limitation, a reasonable limitation, on them
11:42:48 11 asking short of every single document that identifies every
11:42:52 12 single piece of information about every person that fits into
11:42:54 13 one of those categories.

11:42:56 14 MR. MAROVITZ: It would have been simple for us to
11:42:58 15 say the requests are far too broad, and we are just going to
11:43:02 16 object and you can go see the judge.

11:43:04 17 THE COURT: Right.

11:43:04 18 MR. MAROVITZ: We tried to avoid that so that we
11:43:06 19 could provide information that --

11:43:08 20 THE COURT: Would get you started.

11:43:10 21 MR. MAROVITZ: -- would move the case forward.

11:43:12 22 MR. MOGIN: Pure hyperbole.

11:43:14 23 THE COURT: No, it's -- why do you say that,
11:43:16 24 Mr. Megin?

11:43:16 25 MR. MOGIN: Because every single document, every

11:43:18 1 single employee, every single email address or telephone
11:43:22 2 number, every single business affiliation? Not even. We have
11:43:28 3 asked for several discrete categories of people. That's it.
11:43:32 4 We haven't asked for the thousands of mill and plant
11:43:38 5 employees. We haven't even asked in this request for anybody
11:43:42 6 responsible for manufacturing. We simply asked the
11:43:46 7 executives, the board, the planners, the salespeople, and who
11:43:54 8 is responsible for the ESI and the paper archivists.

11:43:58 9 THE COURT: No, you have ESI personnel, paper
11:43:58 10 document archive personnels. I think there's six here.

11:44:02 11 MR. MOGIN: Okay. But it's certainly a far cry from
11:44:04 12 everybody in the organization. And the standard isn't the
11:44:14 13 defendants' unilateral decision about what's relevant. The
11:44:18 14 standard is what's likely to lead to admissible evidence.
11:44:22 15 It's broad, and it's intentionally broad.

11:44:26 16 THE COURT: I'm aware of that.

11:44:28 17 MR. MOGIN: I'm sure you are.

11:44:28 18 MR. MAROVITZ: Judge, their definition of sales
11:44:30 19 personnel is contained in paragraph 27, and it says, Sales
11:44:34 20 personnel shall be construed broadly and means, without
11:44:38 21 limitation, any employees or other persons that had
11:44:42 22 responsibility directly or indirectly relating to sales to
11:44:48 23 customers of containerboard products sold in the U.S.,
11:44:52 24 including any role or responsibility for selling, determining,
11:44:56 25 or establishing pricing, effectuating or establishing terms

11:44:58 1 and conditions of sales and purchases.

11:45:02 2 It's those sorts of very broad definitions that would
11:45:06 3 call for the production of documents and identification of
11:45:10 4 people that are well overly broad.

11:45:12 5 MR. MOGIN: So does the breadth of the request mean
11:45:16 6 that Temple-Inland is allowed to exclude all sales personnel?
11:45:22 7 Does it mean that they are allowed to exclude all management
11:45:24 8 personnel?

11:45:26 9 THE COURT: Well, it makes it harder to reach -- I
11:45:36 10 don't think it's a happy medium, but it does make it harder
11:45:38 11 here, which is why I am sort of saying -- I am making this up
11:45:42 12 as I am going along -- what are you going to go to the mat on?

11:45:52 13 MR. MOGIN: Primary decisionmakers.

11:45:54 14 THE COURT: No, but what is it you really want here
11:45:58 15 is what I am trying to say. I mean, I am sort of bouncing the
11:46:04 16 ball back to you because I don't think you're going to get all
11:46:08 17 salespeople. You're saying you didn't ask for all
11:46:12 18 salespeople, although it sounds like you asked for all
11:46:16 19 salespeople, so I am bouncing it back to you and trying to
11:46:20 20 figure out in this discussion what is it that they could go
11:46:26 21 back? We have found out already the committee structure is
11:46:30 22 important.

11:46:32 23 It sounds like they gave you some of these other
11:46:34 24 categories, but I -- okay. You have given some sales. They
11:46:44 25 are part of some organizational chart.

11:46:46 1 MS. MILLER: Yes.

11:46:46 2 MR. MOGIN: They have only given us their very top
11:46:50 3 salespeople, those that they have identified on their own as
11:46:52 4 the primary decisionmakers.

11:46:54 5 MS. MILLER: There are other salespeople in the
11:46:56 6 organizational charts that we have produced.

11:47:06 7 MR. MOGIN: I don't know when that production was
11:47:08 8 made.

11:47:08 9 MS. MILLER: August 11th of last year.

11:47:16 10 MR. WOZNIAK: Can I just ask for a point of
11:47:18 11 clarification, because I wasn't involved in all this, so in
11:47:20 12 some ways, I am in the same position you are.

11:47:22 13 The organizational charts that you produced go beyond
11:47:24 14 the limiting language that are in the written RFP request; is
11:47:30 15 that accurate?

11:47:30 16 MS. MILLER: Yes, because some of the charts that
11:47:32 17 show the decisionmakers and also include people underneath
11:47:36 18 them, so there's all sorts --

11:47:38 19 MR. WOZNIAK: Was that fact disclosed prior to today
11:47:40 20 so that everyone knew that you had, in fact, produced org
11:47:42 21 charts -- and I'm seriously asking this because I don't
11:47:44 22 know -- org charts that go well beyond the response that one
11:47:48 23 would expect -- the production one would expect to see based
11:47:52 24 on the written response to the RFP?

11:47:58 25 MR. MAROVITZ: Sure, because we identified 22 key

11:48:00 1 custodians and then six administrative assistants in the org
11:48:04 2 charts and how many people are listed on the org charts that
11:48:08 3 were produced?

11:48:08 4 MS. MILLER: I don't know.

11:48:08 5 MR. MAROVITZ: Hundreds?

11:48:10 6 MS. MILLER: Well over a hundred.

11:48:10 7 MR. MOGIN: Respectfully, this isn't the org chart in
11:48:16 8 question. This is our attempt to figure out who may be the
11:48:20 9 proper custodians, who do we need to talk to in the
11:48:22 10 organization, who is going to be our most likely sources of
11:48:26 11 information. And, again, it's simple identification.

11:48:40 12 THE COURT: I just saw something which I hadn't seen
11:48:44 13 before, that list of everybody's custodians.

11:48:56 14 MS. MILLER: It's attached in several places. Do you
11:48:58 15 want all defendants or just ours?

11:49:00 16 THE COURT: Yours.

11:49:02 17 MS. MILLER: Ours? If you go to the January 10th
11:49:04 18 letter, which is Exhibit 8, and the last exhibit in that,
11:49:06 19 which is Exhibit 8, so the last few pages of Exhibit 8 are our
11:49:10 20 list of key custodians.

11:49:34 21 THE COURT: So you're saying -- Mr. Megin, what
11:49:36 22 you're saying is when you were asking for No. 3, what you were
11:49:42 23 asking in RPD No. 3, really was a custodian issue?

11:49:48 24 MR. MOGIN: Identifying people, exactly. Identifying
11:49:50 25 individuals.

11:49:58 1 THE COURT: Do you understand that?

11:50:00 2 MS. MILLER: And in response to No. 3, that's as

11:50:04 3 Mr. Mogin said a while ago, 20 minutes ago, 1 and 3 are kind

11:50:08 4 of related and 3, from our standpoint, was an organizational

11:50:12 5 identifying who these people are. It gives their titles, it

11:50:16 6 gives who they are and where they fit in the organization. So

11:50:18 7 we produced organization charts to show this information. And

11:50:20 8 in addition to showing the people with the top executives, it

11:50:24 9 shows other people below the top executives.

11:50:40 10 THE COURT: Well, when this says, Other board members

11:50:42 11 excluded, that means you do have some board members? I mean,

11:50:50 12 is that what this means, that plaintiffs have some board

11:50:56 13 members?

11:50:56 14 MR. VAN TINE: Well, I assume that somebody that

11:51:04 15 would be considered an ultimate or a primary decisionmaker by

11:51:08 16 the defendant may sit on the board of directors, but I don't

11:51:14 17 think that, for example, it's like -- you know, I personally

11:51:20 18 do not know this, but, for example, the CEO of the company

11:51:26 19 often sits on the board.

11:51:28 20 THE COURT: Right.

11:51:28 21 MR. VAN TINE: On the other hand, boards often have

11:51:34 22 individuals that are outside the company or are formerly

11:51:42 23 former executives with the company that would no longer be a

11:51:50 24 primary decisionmaker, could include different sorts of

11:51:56 25 people.

11:52:10 1 THE COURT: Do you have your actual answer to No. 3
11:52:16 2 here?

11:52:16 3 MS. MILLER: Yes, it's tab number 1 in that book.

11:52:24 4 MR. MAROVITZ: It's on page 21 and 22.

11:53:56 5 THE COURT: So you already -- I mean, I'm trying to
11:54:20 6 -- in order to prepare this chart, you must have their
11:54:24 7 documents that you consider answer No. 3 somehow, right?

11:54:30 8 MR. VAN TINE: No, no, I am discussing what their
11:54:36 9 response to the request to produce states that they are going
11:54:42 10 to produce. Now, for example, I said that I asked people to
11:54:50 11 pull organizational charts. Did I see a chart of the board of
11:54:56 12 directors? No, I did not. I cannot say with, you know, great
11:55:02 13 certainty that it's not possible that one is in there
11:55:04 14 somewhere, or -- but, no, I did not review all of the
11:55:14 15 documents that they have produced to this point rather than
11:55:22 16 relied upon their representation of what they were going to
11:55:26 17 produce and what they did not intend to produce.

11:55:30 18 MR. MOGIN: Remember, your Honor, that that ties back
11:55:32 19 into the Brown testimony.

11:55:36 20 THE COURT: Which part of Brown's testimony?

11:55:38 21 MR. MOGIN: Where he said that the -- only those
11:55:44 22 matters that the defendants said they would be producing in
11:55:50 23 these responses are what is actually being produced. In other
11:55:54 24 words, even if there was a hit from a search terms, it doesn't
11:56:00 25 necessarily mean that it's being produced.

11:56:04 1 THE COURT: Well, that's the way Georgia-Pacific was
11:56:08 2 doing it. We don't know if everyone did it.

11:56:10 3 MR. MOGIN: You heard from Mr. Marovitz earlier with
11:56:14 4 his reference to the Brown testimony.

11:56:16 5 MR. MAROVITZ: I don't have perfect recall about it,
11:56:18 6 but I think Mr. Brown testified about the relationship between
11:56:20 7 the search terms in the Boolean searches and requests. I
11:56:26 8 don't know that he testified, he certainly didn't testify
11:56:28 9 about the way in which the other defendants actually handled
11:56:32 10 the documents to be produced. But if you say that's the way
11:56:38 11 he testified, as I say, I don't remember with perfect recall
11:56:44 12 what his testimony is, but it is what it is.

11:56:46 13 MR. MOGIN: I am glad we are talking about recall.

11:57:00 14 Your Honor, I know you wanted to break at 12:30, but
11:57:04 15 could I possibly take a personal break for just a couple of
11:57:08 16 minutes?

11:57:08 17 THE COURT: Absolutely.

11:57:16 18 (Short break.)

12:06:38 19 MR. MOGIN: I would submit that three things have
12:06:42 20 emerged from this morning's session. The first is that there
12:06:48 21 is an overarching need with Temple, as there is with the other
12:06:50 22 defendants, to deal with the limitation to primary
12:06:54 23 decisionmakers, but we knew that before we got here.

12:06:58 24 We also knew before we got here something about we
12:07:04 25 didn't know what had been hit but had been culled out.

12:07:10 1 THE COURT: What do you mean?
12:07:10 2 MR. MOGIN: We understood that we needed to drill
12:07:14 3 down on that issue. In other words, there are documents that
12:07:18 4 were hit using the search terms, putting aside the validity of
12:07:22 5 the search terms themselves, but that those documents, not all
12:07:26 6 those documents were produced. There were quite a number of
12:07:30 7 non-privileged documents, as we understand it, that have been
12:07:32 8 culled out of the production based upon these objections, and
12:07:38 9 we need to still deal with that issue.

12:07:44 10 And then, lastly, it appears from what we have heard
12:07:48 11 this morning that there may be some documents that have in
12:07:54 12 fact been produced that one would have thought would not have
12:07:58 13 been produced based upon these objections, which,
12:08:06 14 unfortunately, and I will just leave it at that, gets us back
12:08:10 15 to the organizational indexing correlation issues. I am not
12:08:14 16 saying we should take them up.

12:08:16 17 THE COURT: Right.

12:08:16 18 MR. MOGIN: But that's what's emerged.

12:08:18 19 So think about it from -- well, I will just put it,
12:08:22 20 from plaintiffs' perspective, here's where we stand based upon
12:08:26 21 what we have heard and learned this morning.

12:08:30 22 First, we have what we consider to be the
12:08:34 23 redefinition that appears in the responses to the request for
12:08:42 24 production.

12:08:44 25 The second redefinition that we think takes place is

12:08:48 1 when all those get compressed into the search strings that we
12:08:56 2 had very little input on. If you think about it, kind of the
12:09:00 3 way we are going, maybe what we should have done is just given
12:09:02 4 them search strings and not bothered with request for
12:09:08 5 production of documents, but maybe that will be the new
12:09:08 6 protocol.

12:09:10 7 Now we have a situation where --

12:09:12 8 THE COURT: You know what? You have to explain what
12:09:14 9 you mean by that. I don't know what that means.

12:09:16 10 MR. MOGIN: Well, if you take our requests for
12:09:18 11 production of documents, and this is an aside, but if you take
12:09:22 12 our request for production of documents and you just boil that
12:09:24 13 down into a set of search strings that we don't get to submit
12:09:28 14 the search strings, that's kind of a backwards way of doing
12:09:32 15 things. And maybe a lot of this could have been avoided if we
12:09:36 16 had just submitted, instead of RPDs, search your ESI for the
12:09:40 17 following using these search strings or these search tools or
12:09:44 18 something.

12:09:44 19 But the point really was not so much the method as it
12:09:48 20 is the redefinition. And now we've learned that we can't rely
12:09:54 21 entirely on these responses because some things may have been
12:09:58 22 produced where there was an indication that they weren't going
12:10:04 23 to be produced.

12:10:06 24 So from plaintiffs' perspective, what we have are a
12:10:08 25 lot of documents, but we don't know what we have. And we

12:10:16 1 don't really know, absent going through them one at a time,
12:10:20 2 what we have and what we don't have. To us, that doesn't seem
12:10:28 3 to be a particularly efficient process, and what we're trying
12:10:32 4 to do by raising these issues now is get to them now.

12:10:36 5 THE COURT: All right. I want to talk to Ms. Miller
12:10:40 6 about this very issue.

12:10:42 7 MS. MILLER: Okay.

12:10:44 8 THE COURT: I have no idea, having never worked in a
12:10:48 9 law firm, having never been a civil lawyer, having never done
12:10:52 10 a search, having never been to a deposition even, when you
12:10:58 11 produced -- when you produced whatever it was to No. 3 or to
12:11:04 12 any one of the 91, tell me how it looked. When it left your
12:11:10 13 door, was it in paper, was it on a disk --

12:11:14 14 MS. MILLER: Sure.

12:11:14 15 THE COURT: -- and what does the cover letter say?

12:11:18 16 MS. MILLER: Sure.

12:11:20 17 THE COURT: Help me out with that.

12:11:20 18 MS. MILLER: Well, okay. We will talk about the
12:11:22 19 ones -- since the organizational charts are part of the prior
12:11:26 20 production, I will tell you what that one looked like. We
12:11:28 21 have produced no physical paper to plaintiffs.

12:11:30 22 THE COURT: Okay.

12:11:32 23 MS. MILLER: Everything has been in an electronic
12:11:36 24 form, whether it was a TIFF image, or if it was an Excel
12:11:38 25 spreadsheet, we would have produced it natively. They were

12:11:38 1 given the actual Excel with a Bates number page linked to the
12:11:38 2 Excel spreadsheet. PowerPoints, we did the same.

12:11:46 3 So it would come to them either on a hard drive or a
12:11:48 4 DVD or a CD ROM, some sort of electronic media, and the cover
12:11:52 5 letter would simply say, Here is our whatever number
12:11:56 6 production we're on, 1 through -- I think we are on our
12:11:58 7 seventh production, here is the Bates range. And within that,
12:12:02 8 within the actual documents that get produced, there is an
12:12:04 9 agreed ESI protocol order that says, Here is the metadata that
12:12:08 10 you have to provide with respect to each of your documents,
12:12:12 11 and you have to provide OCR texts so it's fully text
12:12:16 12 searchable, you have to provide certain fields on custodians,
12:12:20 13 date -- I don't have them memorized, one of you may, but it's
12:12:22 14 all set forth in the ESI order that's on the docket.

12:12:24 15 So everybody has to -- their productions need to
12:12:28 16 comply with that ESI protocol in terms of the types of
12:12:30 17 metadata so that both sides have the same ability to search
12:12:36 18 the productions for information that has been produced.

12:12:38 19 So they have -- the same database that I have of
12:12:42 20 documents they have because I have produced all the same
12:12:44 21 metadata to them.

12:12:44 22 THE COURT: Okay.

12:12:46 23 MS. MILLER: And so it's all electronic on a hard
12:12:48 24 drive or CD ROM, and they load it into, presumably, based on
12:12:50 25 their prior letters, some sort of review platform which they

12:12:54 1 can search and review and do all sorts of other things.

12:12:58 2 THE COURT: So on the CD ROM, when you were
12:13:02 3 responding to the 92, could you go to your responses, you
12:13:10 4 found what you have here written, and then are the documents
12:13:16 5 with it?

12:13:16 6 MS. MILLER: No.

12:13:18 7 THE COURT: They are not with it.

12:13:18 8 MS. MILLER: No.

12:13:18 9 THE COURT: Okay. Is there a way to reference the
12:13:26 10 documents that you turned over that, in your mind, answered
12:13:32 11 No. 3?

12:13:32 12 MS. MILLER: No. I would know the types of documents
12:13:36 13 I committed and I would run searches for those documents and
12:13:40 14 pull up those documents.

12:13:42 15 THE COURT: From the --

12:13:42 16 MS. MILLER: From the corpus.

12:13:44 17 THE COURT: From the corpus.

12:13:44 18 MR. MAROVITZ: So there are many documents that might
12:13:46 19 be responsive to more than one request.

12:13:48 20 THE COURT: More than one category.

12:13:48 21 MS. MILLER: Yes, there is a lot of overlap in these.
12:13:52 22 One document could respond to five different requests.

12:13:54 23 THE COURT: So are your documents by custodian?

12:14:12 24 MS. MILLER: Yes, ma'am.

12:14:12 25 THE COURT: They are.

12:14:16 1 And they do know which documents go to which
12:14:20 2 custodian?

12:14:22 3 MS. MILLER: Yes, ma'am. It's in the metadata.

12:14:24 4 THE COURT: So what do you mean by that's "in the
12:14:26 5 metadata"?

12:14:26 6 MS. MILLER: First, within each electronic document,
12:14:28 7 there is information in the background that you don't see when
12:14:30 8 you are on the screen.

12:14:32 9 THE COURT: Right. Right.

12:14:32 10 MS. MILLER: It records things like the date it
12:14:34 11 records, who creates the document --

12:14:36 12 THE COURT: Physically. I know what it looks like.
12:14:38 13 But how does --

12:14:40 14 MS. MILLER: There is a load file that is provided
12:14:42 15 when we produce documents that includes -- within that ESI
12:14:44 16 stipulation is a whole series of fields that we have to
12:14:48 17 provide to the extent it's available in the document that says
12:14:50 18 we have to provide a load file so that when they load it into
12:14:54 19 their review system, they can pull up, you know, first our
12:15:00 20 CEO, Doyle Simons, they can say, Okay, in the custodian field,
12:15:04 21 Doyle Simons, give me all of Doyle Simons' documents, and they
12:15:08 22 can run a search, and all the documents that identified a
12:15:10 23 custodian as Doyle Simons will come in their search, and they
12:15:14 24 can look at all of Doyle Simons' documents where he is the
12:15:18 25 custodian.

12:15:18 1 So each of those fields you can search on that have
12:15:20 2 been agreed upon within that ESI protocol, so they can search
12:15:24 3 by custodian or they can search by -- I believe date is one of
12:15:26 4 the other fields.

12:15:28 5 In addition to that, so they can search -- so they
12:15:28 6 can search by those fields, but they can also search using
12:15:32 7 general terms in the corpus of the documents because all of
12:15:36 8 the documents are text searchable. So they can put the word
12:15:40 9 -- they could put my name in, if they wanted to, and any
12:15:44 10 document that happened to have my name on it would come back
12:15:46 11 in their search to the extent the OCR picked up my name.

12:15:50 12 Everybody agree with that description?

12:15:58 13 MR. WOZNIAK: I think that's fair. I mean, the only
12:16:00 14 point I was going to add is that at least some of these early
12:16:04 15 productions took place before the ESI production format
12:16:04 16 stipulation was in place, so I don't know to what extent --
12:16:08 17 you know, Temple-Inland, I can't sit here today and say
12:16:10 18 whether or not they provided all the metadata with that early
12:16:12 19 production that they did for the later productions. Let's
12:16:16 20 assume that they did or came close to doing something like
12:16:18 21 that. That's fine.

12:16:20 22 As for hard-copy documents that are scanned and then
12:16:24 23 OCR text file is created, I believe the stipulation requires
12:16:28 24 that certain metadata fields, if they are not -- they are not
12:16:32 25 associated with a hard copy, they have to be populated and

12:16:36 1 provided to us.

12:16:36 2 MS. MILLER: So as we are collecting hard-copy
12:16:38 3 documents, if I am collecting Doyle Simons' hard-copy
12:16:44 4 documents, I have to provide them with a field that says these
12:16:46 5 are Doyle Simons' hard-copy documents.

12:16:46 6 THE COURT: I see. And there aren't too many
12:16:48 7 hard-copy documents, right?

12:16:50 8 MS. MILLER: No. They are mostly electronic.

12:16:52 9 THE COURT: Even in the mill, even mill documents or
12:16:54 10 even in places that might not be as --

12:16:58 11 MR. VAN TINE: I don't think that given the
12:16:58 12 restrictions that they put on these requests to produce there
12:17:04 13 would be documents that they haven't objected to in the mills,
12:17:10 14 but in any -- as it is, they are saying that they are
12:17:16 15 producing the documents from the people on this list, and none
12:17:20 16 of these people work in a mill.

12:17:28 17 MR. MOGIN: Or a box plant.

12:17:38 18 MR. VAN TINE: The -- actually, if you look at the
12:17:42 19 organization chart, over toward the right, there is a list of
12:17:52 20 mill managers, and what you will see is that with the
12:18:00 21 exception of George Obernesser, who is listed on this document
12:18:08 22 as a mill manager, they did not say -- actually --

12:18:20 23 MS. MILLER: George Obernesser is not a key
12:18:22 24 custodian. That check mark is incorrect.

12:18:24 25 MR. VAN TINE: Okay. But I believe that he showed up

12:18:28 1 on another chart of yours. Yeah, he showed up -- then he
12:18:34 2 showed up on a star because there is some confusion.

12:18:40 3 He is listed as a custodian whose non-email ESI has
12:18:46 4 been ingested into their file system archive tool which is on
12:18:52 5 Exhibit A to Ms. Miller's January 10, 2012, letter, but he is
12:19:00 6 not a custodian. So none of the mill managers were identified
12:19:04 7 as custodians.

12:19:08 8 MR. MOGIN: And, thus, their documents are not being
12:19:10 9 produced.

12:19:10 10 MR. MAROVITZ: Right. Judge, just to be clear,
12:19:14 11 during the Rule 30(b)(6) deposition that took place over a
12:19:18 12 period of two days, there was a substantial description of the
12:19:24 13 way that data flow from the mills and the box plants.

12:19:28 14 THE COURT: I am so sorry I said the stupid mill.
12:19:32 15 That just came out of my mouth.

12:19:34 16 MR. MAROVITZ: But there is a substantial description
12:19:34 17 which I won't attempt to repeat about the way the data flow
12:19:38 18 from the mills and the box plants to the centralized systems.

12:19:44 19 So the fact that certain data and documents are not
12:19:48 20 being produced from the mill does not mean that the relevant
12:19:52 21 data and documents are not being produced from the centralized
12:19:56 22 systems. It's rolled up.

12:20:00 23 MR. VAN TINE: I would actually take some issue with
12:20:02 24 that. There are categories of data, particularly with respect
12:20:06 25 to mills, that do not flow to the centralized data system.

12:20:14 1 One of the allegations in this suit has to do with down time
12:20:20 2 of paper machines and paper mills.

12:20:22 3 THE COURT: Yes.

12:20:24 4 MR. VAN TINE: And, in fact, down time of paper
12:20:26 5 machines and paper mills is a category of data that does not
12:20:30 6 flow to the centralized systems and instead, at most, there
12:20:38 7 was some sort of report that the 30(b)(6) deponent wasn't
12:20:46 8 certain exactly what it was. It was given to Jeremy Toohey,
12:20:52 9 who is another person whose role is sort of ambiguous because
12:20:58 10 we just were discussing Mr. Obernesser, who was listed as
12:21:04 11 someone that they collected documents for but is not a
12:21:08 12 custodian.

12:21:10 13 Mr. Toohey seems to be in the opposite situation.

12:21:14 14 They listed him as a custodian, but they did not list him as
12:21:18 15 someone that they were collecting non-email ESI for. In
12:21:22 16 fairness, I will say that they did produce emails from him in
12:21:30 17 the May production, but his status as a custodian is
12:21:34 18 ambiguous.

12:21:36 19 MR. MAROVITZ: Judge, we need to set the record
12:21:38 20 straight on this.

12:21:38 21 MS. MILLER: Yes. Mr. Van Tine is conflating a
12:21:42 22 couple of things.

12:21:42 23 The people that we have identified as our custodians
12:21:46 24 are the people that are identified in this chart. The people
12:21:48 25 that are identified on Exhibit A to my letter are not people

12:21:52 1 -- are not people for whom -- that is simply people that at
12:21:56 2 the initial of our outset of the litigation as we were
12:21:58 3 collecting documents, we initially ingested their documents
12:22:02 4 into the FSA. Ultimately, we didn't ingest everybody's who
12:22:08 5 was a custodian, we ingested some people that weren't a
12:22:12 6 custodian. That was at the outset of this litigation back in
12:22:12 7 September 2010, when we were first preserving documents.

12:22:16 8 So Exhibit A doesn't -- other than the fact that
12:22:20 9 those people do exist in our FSA, has nothing to do with who
12:22:24 10 our identified custodians are. Mr. Toohey is an identified
12:22:28 11 custodian, and we are collecting all of his email and we have
12:22:30 12 produced all of his email and his loose e-files.

12:22:32 13 So you have to set aside the Exhibit A. That's a
12:22:34 14 conflagration of two points.

12:22:36 15 THE COURT: It looks like it's a good thing you're
12:22:38 16 saying this because Mr. Wozniak is looking very confused.

12:22:42 17 MR. WOZNIAK: As to preservation, was his non-email
12:22:48 18 ESI in fact preserved or ingested into the archive system at
12:22:50 19 the commencement of the litigation?

12:22:52 20 MS. MILLER: Our 30(b)(6) deposition is very clear on
12:22:54 21 this in terms of how everybody's stuff was -- I beg to
12:22:58 22 disagree. It's very clear, and our January 10th letter lays
12:23:02 23 out exactly how everybody's stuff was collected and how it was
12:23:04 24 ingested and how we have dealt with it.

12:23:08 25 So Mr. Toohey is one of the people who we have

12:23:10 1 collected his email and we collected his e-files as laid out
12:23:16 2 in that January 10th letter. Those have been processed,
12:23:20 3 reviewed, and the responsive documents have been produced.

12:23:22 4 The FSA tool was an original one. It was a tool that
12:23:24 5 we originally implemented at the outset of the litigation but
12:23:28 6 ultimately didn't end up using for collecting all of our,
12:23:32 7 quote, unquote, loose e-files or other related information.

12:23:36 8 MR. MOGIN: Respectfully, I believe we have a list,
12:23:36 9 do we not, of whose email we have at this point from Temple?

12:23:42 10 MR. WOZNIAK: We do. And there is no dispute.

12:23:44 11 MR. MOGIN: I don't believe Mr. Toohey is on that.

12:23:46 12 MR. WOZNIAK: Mr. Toohey did, in fact, produce email.
12:23:50 13 Matt made that point a moment ago.

12:23:54 14 But the confusion is over this --

12:23:56 15 MR. VAN TINE: Exhibit A, which is not about email,
12:24:00 16 which Ms. Miller had attached to a January 10, 2012, letter,
12:24:04 17 which is not limited.

12:24:20 18 MS. MILLER: Yes, exactly. This is part of tab 8 of
12:24:28 19 the January 10th letter. If you read the January 10th letter
12:24:34 20 in its entirety, it explains what it is, but it does not speak
12:24:38 21 to what documents we ultimately searched for and produced
12:24:42 22 because merely because a document was not in the FSA does not
12:24:44 23 mean it was not preserved and does not mean it was not looked
12:24:46 24 at or reviewed for purposes of production.

12:24:50 25 With respect to the down time recitation that Mr. Van

12:24:54 1 Tine made a moment ago, I have to take issue with that as well
12:24:56 2 because that's not what -- what the 30(b)(6) made clear was
12:25:00 3 that the system that he is talking about, that, quote,
12:25:02 4 unquote, tracks down time in the mills, it is not an accurate
12:25:04 5 report of down time. It is a system that gets -- according to
12:25:08 6 our 30(b)(6) witness, gets turned off periodically, and as a
12:25:12 7 result, there are these reports that are made by the mills
12:25:14 8 that are then sent to Jeremy Toohey for purposes of tracking
12:25:20 9 what the actual down time in the mills are.

12:25:22 10 And one of the separate questions that plaintiffs
12:25:24 11 have asked us which we have agreed to look into is to how far
12:25:26 12 back we have these reports, and we are looking into how far
12:25:30 13 back we have them.

12:25:34 14 But we have also kind of gotten off track again.

12:25:36 15 THE COURT: We did. I thought I was so organized.
12:25:42 16 I'm sorry.

12:25:44 17 Let's kind of decide how we're going to use the
12:25:46 18 afternoon. We are going to take a break. I have to eat. I
12:25:52 19 don't know about you guys, but I need to eat something.

12:25:56 20 So 12:30 to 1:15; and then I think we could try to go
12:26:02 21 1:15 to 3:00, 3:15, something like that. What do you think?

12:26:10 22 MR. MOGIN: That's fine with us, your Honor.

12:26:12 23 MR. MAROVITZ: Sure.

12:26:12 24 MR. FREED: I do think your suggestion of discrete
12:26:16 25 items, if we can isolate discrete items --

12:26:20 1 THE COURT: I think we can list them right now if you
12:26:22 2 know what you'd like to talk about.

12:26:22 3 MR. FREED: Certainly.

12:26:24 4 THE COURT: Favorite hit lists, not the null set,
12:26:26 5 not --

12:26:28 6 MR. FREED: Lit hold I think is discrete.

12:26:28 7 THE COURT: Litigation hold. Definitely. We have
12:26:32 8 even done some research on it.

12:26:32 9 MR. MAROVITZ: I don't know that that's the right
12:26:34 10 issue for us. Just to be clear, our foothold was sent to
12:26:42 11 people with email addresses. So that may be a better issue
12:26:46 12 for Georgia-Pacific or International Paper.

12:26:52 13 THE COURT: What do you mean? Your --

12:26:52 14 MR. MAROVITZ: Our lit hold notice was sent to
12:26:54 15 Temple-Inland employees who had email addresses. Anybody with
12:26:56 16 an email address at Temple-Inland received a litigation
12:27:00 17 notice.

12:27:00 18 MS. MILLER: Thousands.

12:27:02 19 MR. MAROVITZ: So it's not really a Temple-Inland
12:27:06 20 issue is what we're saying. Or we could say it is a
12:27:08 21 Temple-Inland issue and we can check it off the list.

12:27:12 22 MR. VAN TINE: Well, the question with Temple-Inland
12:27:12 23 is more what the lit hold was.

12:27:16 24 THE COURT: Well, that's a different question. The
12:27:18 25 law is very up for grabs on that. We're not talking -- I

12:27:22 1 thought --

12:27:22 2 MR. VAN TINE: Or what someone --

12:27:24 3 THE COURT: I thought what we were trying to do was
12:27:26 4 another way to gather more custodians and if you had the names
12:27:32 5 of the people who have the litigation hold. I have a list
12:27:36 6 here of ways to get more custodians or ways to increase the
12:27:40 7 number of custodians.

12:27:44 8 The content of the litigation hold I think is a legal
12:27:48 9 issue that's got to be briefed. I mean, that's up for grabs.
12:27:52 10 I don't imagine with the way the case law is anybody is going
12:27:56 11 to agree to that one.

12:27:56 12 MR. VAN TINE: There is also an issue about what was
12:27:58 13 done in response.

12:28:00 14 MR. MOGIN: But you're separating that out from the
12:28:02 15 identification of the people who received the lit hold.

12:28:04 16 THE COURT: Yes, because I cut you off again, and I'm
12:28:08 17 sorry, in the beginning, after 18 hours locked in my house, I
12:28:14 18 don't know whether this doesn't boil down to who the heck are
12:28:18 19 the custodians here, and if you've got a larger group of
12:28:24 20 custodians, would you shut up about everything else?

12:28:28 21 Literally.

12:28:30 22 MR. FREED: I can give you the answer, no.

12:28:32 23 THE COURT: Right. No. But because I think we are
12:28:38 24 circling the wagon on custodians is what we are doing in a
12:28:42 25 real big way. And in the same way that I don't want to talk

12:28:46 1 about how many thousands, millions of pages you've turned
12:28:50 2 over, I don't think, if you had the one right custodian, one
12:28:54 3 would be enough. I don't think it's a numerical -- I don't
12:29:00 4 think it's a numerical magic number here, one or a thousand of
12:29:10 5 them, because what would you do if you got a thousand of them?
12:29:12 6 You'd never leave your office.

12:29:16 7 MR. FREED: I think -- and I am speaking perhaps for
12:29:20 8 Mr. Mogin, who hasn't had a chance to respond. I think
12:29:22 9 getting more custodians would be helpful. I don't think it
12:29:26 10 would solve --

12:29:26 11 THE COURT: But we are not going to go down the
12:29:28 12 track, get more custodians, and then there is another issue
12:29:32 13 here. See, that's kind of what -- it kind of happened -- I
12:29:34 14 got very discouraged on this darn old word dictionary thing
12:29:40 15 because it was going to be like a Band-Aid to help something
12:29:44 16 else, and then we get the word dictionary and -- I mean,
12:29:48 17 that's what -- part of what I think our discussion is about
12:29:50 18 today is to try to figure out what the issues are.

12:29:54 19 So I am a little discouraged, but I am not because I
12:29:58 20 certainly have a better grasp of like the request to produce
12:30:04 21 documents than I did at 10:00 o'clock.

12:30:06 22 So I would like to talk -- okay. What else did
12:30:10 23 anybody have here? What were some of our other issues, Chris,
12:30:16 24 on the topics so we can think about them over lunch?

12:30:18 25 I know what I need. This transactional data index, I

12:30:22 1 have no idea what you are talking about, and I now have charts
12:30:26 2 on it. So can you talk about that for five minutes --

12:30:30 3 MR. MAROVITZ: Yes, let's --

12:30:30 4 THE COURT: -- this afternoon, since I don't know
12:30:32 5 what it is?

12:30:34 6 MR. MAROVITZ: Yes. We can -- Mr. Mogin mentioned it
12:30:40 7 before.

12:30:40 8 THE COURT: Right.

12:30:40 9 MR. MAROVITZ: The plaintiffs would like to have,
12:30:46 10 like many plaintiffs would like to have, a database,
12:30:50 11 essentially, of transactional data so that they get certain
12:31:00 12 kinds of data from all the defendants that they can populate
12:31:02 13 their database with.

12:31:04 14 So Mr. McKeown sent Mr. Mogin a draft list of fields
12:31:10 15 of the sorts of data that, if they're available, the
12:31:14 16 defendants might be able to send over to the plaintiffs. And
12:31:16 17 Mr. Mogin is consulting with his expert to figure out whether
12:31:20 18 that list is sufficient or needs to be amended, and then he
12:31:24 19 will get back to us and he will tell us. That's really what
12:31:26 20 that is.

12:31:26 21 THE COURT: Okay.

12:31:30 22 MR. MOGIN: I'm going to say I agree. Could you mark
12:31:34 23 that in the record?

12:31:34 24 THE COURT: Sure. So then we are only going to --
12:31:36 25 the whole afternoon, we are only going to discuss

12:31:40 1 transactional data indexes.

12:31:42 2 MR. MOGIN: No, no, just conduct. We don't have to
12:31:44 3 talk about those.

12:31:48 4 MR. FREED: I think the only item we haven't at least
12:31:50 5 touched on would be 30(b) (6).

12:31:52 6 THE COURT: Yes.

12:31:54 7 MR. FREED: And I am not aware that there is any
12:31:56 8 issues.

12:31:56 9 MR. MAROVITZ: I don't think there is. I really
12:31:58 10 don't. Again, I think all lawyers here are willing to stay as
12:32:02 11 long as the court believes it would be productive; but it
12:32:04 12 might also be the case that some of these issues might be
12:32:08 13 framed better by others. I am sure, for example, you will
12:32:12 14 hear tomorrow that the list of people that got the litigation
12:32:16 15 hold doesn't bear any relationship to the list of proper
12:32:20 16 custodians.

12:32:20 17 THE COURT: Well, it can, it cannot, depending on how
12:32:24 18 they did it.

12:32:24 19 MR. MAROVITZ: Right. All I'm saying, Judge, is
12:32:26 20 that's not an argument that really relates to us.

12:32:28 21 THE COURT: Right. Right.

12:32:30 22 MR. MAROVITZ: It's just -- it's a better argument
12:32:30 23 that ought to be between the plaintiffs and either
12:32:34 24 International Paper or Georgia-Pacific.

12:32:52 25 THE COURT: We will come back at 1:15 and we will see

12:32:54 1 where we are.

12:33:00 2 (Whereupon, the hearing was adjourned at 12:30 p.m. until
12:33:04 3 1:15 p.m. of this same day and date.)

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

3 KLEEN PRODUCTS, LLC, et al.,) Docket No. 10 C 5711
4 Plaintiffs,)
5 vs.)
6 PACKAGING CORPORATION OF AMERICA,) Chicago, Illinois
et al.,) May 30, 2012
7 Defendants.) 1:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS - RULE 16 CONFERENCE
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN
VOLUME 1-B

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01:22:22 1 (The following proceedings were had in open court:)

01:22:22 2 THE COURT: Okay. So we are back on the record in
01:22:26 3 Kleen and our Rule 16 conference.

01:22:30 4 I do have a couple -- I just want to kind of close it
01:22:36 5 off on the request for production. Mr. Megin, the other day,
01:22:44 6 with the four defendants, who either gave themselves A pluses
01:22:50 7 on their progress or we gave them A pluses, are you satisfied
01:22:56 8 with their answers on the requests to produce documents, or
01:23:02 9 have you been able to work it out with them?

01:23:06 10 MR. MOGIN: The answer is no and no with a big
01:23:10 11 caveat, and the caveat is that I think we will be able to work
01:23:14 12 it out with them. In part, our ability to work it out with
01:23:18 13 them will depend on how the next two days go.

01:23:20 14 THE COURT: Okay.

01:23:22 15 MR. MOGIN: In other words, from my perspective,
01:23:26 16 those defendants with respect to these common issues like
01:23:28 17 parsing, et cetera, or whatever word we use or we care to use.

01:23:34 18 THE COURT: Right.

01:23:34 19 MR. MOGIN: There is a bit of follow the leader. And
01:23:36 20 the extent to which they engaged in the practice is not quite
01:23:42 21 as much as the three defendants that we are working with these
01:23:48 22 two days.

01:23:48 23 THE COURT: Well, do you think if you tried to do it,
01:23:54 24 tried to figure it out with them, we could learn something
01:23:58 25 that would help us in trying to figure it out here?

01:24:02 1 MR. MOGIN: I am a little skeptical of that approach
01:24:04 2 because of what I perceive to be the follow-the-leader
01:24:08 3 pattern, and I think the three defendants that you have culled
01:24:10 4 out, if you will, for these two days are more or less the
01:24:14 5 leaders, but Temple gets a leader minus, I guess.

01:24:20 6 MS. MILLER: I won't take that personally.

01:24:26 7 MR. VAN TINE: They are not a primary decisionmaker,
01:24:28 8 you're saying?

01:24:32 9 THE COURT: Well, okay. Do you have -- I think you
01:24:38 10 mentioned this before. Do you have any authority, any legal
01:24:48 11 cases on this issue of the request to produce the way that you
01:24:54 12 framed these and sort of the procedure on the way people
01:25:02 13 either objected or filed or answered or parsing or anything?
01:25:08 14 Do you have any authority on this at all?

01:25:10 15 MR. MOGIN: Yes.

01:25:10 16 THE COURT: Oh, good. What do you have, either
01:25:14 17 helpful or not helpful? I mean, anything. Can you get us all
01:25:20 18 those cites?

01:25:20 19 MR. MOGIN: Yes.

01:25:20 20 THE COURT: I'd love to see them.

01:25:22 21 MR. MOGIN: I can think of two cases off the top of
01:25:26 22 my head. Unfortunately, I can't give you the cites. They may
01:25:30 23 both be out of the district court in Kansas, and the procedure
01:25:38 24 that was followed here was rejected in those two cases. And I
01:25:40 25 will try to get you the cites. In fact, next time we break, I

01:25:44 1 will send an email, and I think I can get the cites.

01:25:46 2 THE COURT: All right.

01:25:48 3 MR. MOGIN: The other authority, of course, is the
01:25:52 4 rule, which basically says -- it gives you a binary choice, as
01:25:58 5 I understand the rule, which is say that you're going to
01:26:00 6 produce or say that you're not going to produce, and there
01:26:04 7 doesn't really seem to be a third way; although, frankly, I
01:26:08 8 won't tell you that I've never seen the third way, but I will
01:26:12 9 say that it's much more isolated than anything -- than what I
01:26:16 10 have seen in this case. So it's usually, say, if I were to
01:26:20 11 put out in another case 90-some RPDs, maybe half a dozen,
01:26:24 12 maybe a dozen, something like that, would be qualified like
01:26:26 13 that, not what we have seen in this case.

01:26:32 14 MR. MAROVITZ: Judge, we obviously would be
01:26:34 15 interested in seeing the authority as well.

01:26:34 16 THE COURT: Right.

01:26:34 17 MR. MAROVITZ: And we'd like an opportunity to submit
01:26:38 18 authority that we think supports what we have.

01:26:40 19 THE COURT: And I am not saying -- I am giving up on
01:26:42 20 this issue for today, but I am a stubborn Irish woman, as you
01:26:46 21 know, and I am not -- I just feel like --

01:26:50 22 MR. MOGIN: Your Honor, you shouldn't discriminate on
01:26:52 23 the basis of gender.

01:26:54 24 THE COURT: Or national origin.

01:26:58 25 MS. MILLER: And nationality.

01:27:00 1 THE COURT: I don't know. I don't know. I can't get
01:27:06 2 my hands around it. Over lunch I looked at one. I was trying
01:27:10 3 to think are there any specifics that I had a guttural
01:27:18 4 reaction to when I read them the first time, because that's
01:27:22 5 how I actually kind of know, and are there any things we could
01:27:24 6 take off the table. But we are going to have plenty of time
01:27:30 7 to revisit this.

01:27:32 8 As you can tell, I am trying very hard. If we are
01:27:38 9 going to have to go to written motions, my goal is to get them
01:27:42 10 as narrow as can be. So even if we in the end as a group
01:27:46 11 decide something has to be briefed, then at least we should
01:27:50 12 get it down to hard-core issues. We are way far -- as far as
01:28:00 13 I'm concerned, today was the first crack at this.

01:28:04 14 So let's talk about with Temple, specifically with
01:28:10 15 Temple, because I did want some individual focus. Right
01:28:14 16 before the break, I thought you all agreed that there are no
01:28:18 17 more 30(b)(6) issues. I thought in a status report, you told
01:28:22 18 us how long -- you had two people who testified, it was for a
01:28:28 19 very long period of time. Are you satisfied with their
01:28:32 20 30(b)(6)?

01:28:32 21 MR. MOGIN: Mr. Van Tine took those depositions.

01:28:34 22 MR. VAN TINE: Generally, yes. I mean, it was not
01:28:38 23 perfect. I mean, there were issues that they could not
01:28:44 24 answer, but --

01:28:48 25 THE COURT: Because they also did -- it wasn't just

01:28:52 1 the 30(b)(6), but also there were letters prior to the
01:28:54 2 30(b)(6).

01:28:56 3 So if you have a follow-up, if you've got any like
01:29:00 4 cleanup questions, do you think you can just send those in a
01:29:04 5 letter and ask what the answers are and be satisfied and move
01:29:08 6 on is what I am saying?

01:29:10 7 MR. MOGIN: We think so, yes, Judge.

01:29:12 8 MR. VAN TINE: Yes.

01:29:12 9 THE COURT: Good. All right. On the issue of the
01:29:16 10 litigation hold, this was not in a formal discovery request,
01:29:22 11 but we are, as I am saying, circling ways to get or ways to
01:29:32 12 talk about more custodians. I understood from the plaintiffs
01:29:36 13 that they wanted to know who the litigation hold was issued to
01:29:44 14 and today it seems you also want the content of the hold. I
01:29:46 15 think those are two separate issues.

01:29:50 16 And will you just put on the record what your client
01:29:54 17 did litigation hold-wise.

01:29:56 18 MS. MILLER: Sure. As set forth in our January 10th
01:29:58 19 letter and as testified during our 30(b)(6), shortly after the
01:30:04 20 litigation was filed, the litigation hold was sent to every
01:30:06 21 single Temple-Inland employee with an email address.

01:30:12 22 THE COURT: How many people is that?

01:30:12 23 MS. MILLER: Over 5,000.

01:30:14 24 THE COURT: Okay. And that hasn't been modified
01:30:22 25 since you begun?

01:30:24 1 MS. MILLER: Not as of yet. We are looking to see
01:30:28 2 whether or not there are whole swaths of people that we don't
01:30:32 3 have to look at; but, no, it has not been modified as of yet.

01:30:36 4 THE COURT: And the litigation hold was just
01:30:36 5 approximately the filing of the complaint?

01:30:40 6 MS. MILLER: It was within a matter of a week or so
01:30:42 7 after the complaint, I believe, a couple weeks. I don't
01:30:48 8 remember the exact date.

01:30:48 9 THE COURT: So this thing, regardless of whether or
01:30:52 10 not it was accurate, because it's not a matter of accuracy, so
01:30:58 11 the litigation hold, so this was suspended during the
01:31:02 12 litigation hold?

01:31:04 13 MS. MILLER: Yes, ma'am. And it was laid out in our
01:31:04 14 January 10th letter. We suspended the automatic deletion
01:31:10 15 feature.

01:31:10 16 THE COURT: January 10th, 2012?

01:31:12 17 MS. MILLER: The January 10th letter, yes. It's
01:31:16 18 Exhibit 8.

01:31:22 19 Yes, ma'am, Exhibit 8 lays out what we did in terms
01:31:26 20 of the litigation hold, who it was instituted to and who we
01:31:30 21 sent it out to.

01:31:32 22 THE COURT: Does that satisfy you with Temple-Inland,
01:31:36 23 or do you still have on the table you want the content of --

01:31:40 24 MR. VAN TINE: Well, they did not allow the 30(b)(6)
01:31:44 25 witness to testify about the content or really what he did in

01:31:50 1 response, what he personally did. He was not a lawyer. You
01:31:58 2 know, when I asked him -- and I am referring to Shawn Dunn --
01:32:04 3 when I asked him what sort of documents did you not delete as
01:32:10 4 a result of this, he was instructed not to answer the
01:32:12 5 question.

01:32:24 6 So the issue is really what it said and what it
01:32:30 7 stopped people from doing, what people actually did. One of
01:32:38 8 the general -- I don't want to get off topic, but one of the
01:32:42 9 general issues here has been that Temple-Inland relies -- has
01:32:46 10 relied on collection methods or policing for the collection,
01:32:56 11 which may be not adequate or may not be as professional as it
01:33:06 12 might be.

01:33:08 13 THE COURT: So we actually have identification which
01:33:10 14 could go to custodians, we have the language of the hold, and
01:33:18 15 then I guess preservation is also -- I mean, I guess there's
01:33:20 16 kind of like three components to it. And are they all willing
01:33:26 17 to tell you who the litigation holds went to?

01:33:30 18 MR. MOGIN: To the contrary, none of them are willing
01:33:32 19 to tell us who got the hold.

01:33:36 20 MR. FREED: Well, you just told us.

01:33:40 21 MS. MILLER: We told you back in January.

01:33:40 22 THE COURT: They did. They just said 5,000 people.

01:33:44 23 MS. MILLER: Okay. Just to be clear, and I just
01:33:48 24 looked at the deposition, it is true that we instructed
01:33:50 25 Mr. Dunn not to answer with respect to what the litigation

01:33:52 1 hold said, but Mr. Van Tine did inquire what he did with
01:34:00 2 respect to his documents, and he did testify.

01:34:02 3 THE COURT: That's enough on this.

01:34:04 4 MR. VAN TINE: Okay.

01:34:04 5 THE COURT: This is -- in my quest, Mr. Mogen has a
01:34:10 6 quest for custodians, I have a quest too, of maybe getting
01:34:18 7 more custodians at some time down the road. And to me when
01:34:20 8 you folks said, Tell us who you sent the litigation hold to,
01:34:24 9 that seemed to be a logical way to do it.

01:34:28 10 MR. MAROVITZ: Judge, can I make one observation on
01:34:30 11 custodians?

01:34:30 12 THE COURT: Yes.

01:34:32 13 MR. MAROVITZ: We had an original list of people who
01:34:34 14 we had thought would be the custodians in our original initial
01:34:38 15 Rule 26 disclosures. And then we actually had a meet and
01:34:42 16 confer with the plaintiffs, and we expanded the list to
01:34:46 17 include the list that we are talking about now. So we started
01:34:50 18 more narrow, then we had a discussion, and we expanded it.

01:34:54 19 Since that time, we have mentioned to the plaintiffs,
01:34:58 20 and I think probably all defendants have said this, that if
01:35:00 21 there are other custodians who they believe should be added
01:35:06 22 and we agree should be added, just as we added the earlier
01:35:10 23 ones, that we would do so.

01:35:12 24 There may be disputes. I am not suggesting --

01:35:16 25 MR. FREED: There are disputes.

01:35:16 1 MR. MAROVITZ: There may be disputes, but I want to
01:35:20 2 be clear that it is not our intention simply to add custodians
01:35:26 3 for the sake of adding custodians; that is, if there are
01:35:30 4 people who are, in our view, proper custodians, then we surely
01:35:36 5 will be interested in adding them.

01:35:36 6 THE COURT: Good. That's what I was hoping you were
01:35:42 7 going to say.

01:35:44 8 Let's talk about discovery. Let's talk about
01:35:48 9 something safe here. This is very safe. All right. Let's
01:35:54 10 talk about the overall discovery in this case with Judge
01:35:58 11 Shadur.

01:35:58 12 Have you talked about, if the class is going to be
01:36:04 13 bifurcated, are you doing class discovery first, are you
01:36:12 14 doing -- you know, I don't have any idea how he approaches
01:36:18 15 class cases and specifically antitrust cases.

01:36:26 16 MR. MOGIN: Well, first off, your Honor, in our view,
01:36:34 17 bifurcation of discovery is simply -- it's very inefficient
01:36:42 18 for all the parties, and it raises the prospect of disputes
01:36:46 19 about what is proper for class and what's proper for post
01:36:50 20 class. And as the law on class certification has evolved and
01:36:56 21 more and more of the merits get considered on class
01:37:00 22 certification, the idea of bifurcating has gotten even more
01:37:04 23 distasteful, if you will. It's just not practical. Judge
01:37:10 24 Shadur hasn't said anything about bifurcating.

01:37:14 25 With all that said, we'd obviously like to get class

01:37:18 1 sooner rather than later. There's really nothing to
01:37:24 2 bifurcate.

01:37:26 3 THE COURT: Right.

01:37:26 4 MR. MOGIN: You know, we have to talk about
01:37:28 5 liability, we have to talk about damages, we have to talk
01:37:32 6 about common impact.

01:37:36 7 MR. VAN TINE: The hydrogen peroxide case that
01:37:40 8 everyone talks about was actually cited to and followed the
01:37:46 9 seventh circuit's case in Szabo, S-z-a-b-o, v. Bridgeport
01:37:58 10 Machinery, which itself stated that long before hydrogen
01:38:06 11 peroxide came out of the third circuit, that it was necessary
01:38:10 12 to look at the merits to the extent that they were relevant to
01:38:16 13 the class certification decision when deciding whether or not
01:38:20 14 to certify a class.

01:38:24 15 THE COURT: How many -- what do you think is the
01:38:26 16 projected class size here?

01:38:30 17 MR. MOGIN: In terms of the number of members?

01:38:32 18 THE COURT: Yes.

01:38:32 19 MR. MOGIN: I don't know. I can tell you the amount
01:38:36 20 of commerce, perhaps, but not the amount of members in the
01:38:38 21 class.

01:38:38 22 THE COURT: Do you do an actual -- they are not going
01:38:42 23 to be individuals? It's going to be companies?

01:38:44 24 MR. MOGIN: By and large, yes.

01:38:46 25 MR. FREED: Yes.

01:38:46 1 THE COURT: But you don't know if it's five or a
01:38:48 2 hundred?

01:38:52 3 MR. WOZNIAK: It's well in excess of a hundred. I
01:38:54 4 don't know if we are talking about how many thousands or
01:38:58 5 hundreds.

01:38:58 6 MR. MOGIN: I believe in the liner board case, which
01:39:00 7 was a similar case about 10 years ago, that the number of
01:39:04 8 class members exceeded 10,000.

01:39:18 9 THE COURT: One of the reasons I asked that is that
01:39:22 10 when I threw out the other day how would people feel about
01:39:30 11 some discovery being phase one and phase two, and I was
01:39:34 12 talking about e-discovery, but here it's mostly e-discovery.
01:39:38 13 I think it's fair to say we're mostly talking e-discovery.

01:39:42 14 So I don't know -- I guess to answer the question, if
01:39:46 15 Judge Shadur were sitting around this table right now and he'd
01:39:50 16 say, Dan, do you want to bifurcate for the class, it sounds
01:39:54 17 like you don't want to --

01:39:54 18 MR. MOGIN: I do not.

01:39:54 19 THE COURT: -- so the defendants usually don't want
01:39:58 20 to bifurcate, do you?

01:40:00 21 MR. MAROVITZ: You know, this is the first time we
01:40:02 22 have heard this. I don't really have a view at this point.

01:40:08 23 THE COURT: I think the way the e-discovery is going,
01:40:10 24 you know, I was trying to figure out within phase one and
01:40:26 25 phase two, this is my next question, if we are going to be --

01:40:34 1 which I want to talk about, when do you think your production
01:40:38 2 of what you have agreed to right now, just approximately, when
01:40:48 3 they could receive it? And then the question to them is when
01:40:52 4 they receive it, approximately how long before they can review
01:40:58 5 it?

01:40:58 6 MS. MILLER: And we talked about this at the
01:41:00 7 April 19th meet and confer between the parties. And at that
01:41:06 8 time, we had largely divided our production to tranches,
01:41:12 9 groupings of types of documents that would be produced.

01:41:12 10 THE COURT: Tell me what they were, if you will.

01:41:14 11 MS. MILLER: Sure. The first grouping was the named
01:41:18 12 custodian's email and their -- what we call their loose
01:41:22 13 e-files. And by those, I mean word documents, PDFs, Excel
01:41:30 14 spreadsheets, and other things that are stored on their
01:41:32 15 personal computers, their desktops and their laptops, and on
01:41:36 16 their personal network drives.

01:41:38 17 So that was the production we just made, the 1.3 --
01:41:42 18 no, the big production, the huge production we made on
01:41:46 19 May 9th. That was that grouping.

01:41:48 20 The second grouping is hard copy documents.

01:41:50 21 THE COURT: Hard copy?

01:41:52 22 MS. MILLER: Hard copy. So those have to be scanned
01:41:54 23 and reviewed. So that was -- we are in the process of doing
01:41:58 24 that now. As I sit here, I don't have an estimate yet. I'd
01:42:02 25 have to check with my review team as to when we think that

01:42:06 1 grouping would be available for production, but we are
01:42:08 2 shooting for that being the next big chunk.

01:42:12 3 THE COURT: Okay.

01:42:12 4 MS. MILLER: The third was the -- third grouping was
01:42:16 5 the documents responsive to what we're calling the
01:42:18 6 sufficient-to-show requests. As you read through the document
01:42:22 7 requests, there were a number of document requests that say,
01:42:24 8 Give us documents sufficient to show this information, give us
01:42:28 9 documents sufficient to show that information. So those are
01:42:32 10 what we are considering non-custodian specific, necessarily,
01:42:34 11 so we are going and finding documents from wherever they
01:42:38 12 reside in the company sufficient to show the information
01:42:40 13 requested.

01:42:42 14 THE COURT: Is that going to be correlated to the
01:42:44 15 number? I mean, is that one going to be correlated --

01:42:48 16 MS. MILLER: That one will be more easily correlated
01:42:52 17 -- for example, I think it's request No. 4, as I'm sitting
01:42:56 18 here is the one I'm thinking about, request No. 4 asks for...

01:42:56 19 THE COURT: Let me run get something. I'll be right
01:42:56 20 back up.

01:42:56 21 (Brief pause.)

01:43:46 22 MS. MILLER: This is not a sufficient to show. This
01:43:46 23 is a grouping that's going to be produced. For example, we
01:43:46 24 are going to produce our expense reports all together. That's
01:43:50 25 where I was going with it.

01:43:52 1 THE COURT: Okay.

01:43:56 2 MS. MILLER: I can pick a different one if you'd
01:43:58 3 like.

01:43:58 4 THE COURT: Okay.

01:44:02 5 MS. MILLER: To be clear, request No. 4 is not a
01:44:04 6 sufficient-to-show request, but it's what I'm putting in one
01:44:08 7 of these type of category requests. So request No. 4 asks for
01:44:12 8 people's calendars and their expense reports and their
01:44:14 9 telephone number logs, and their contact folders, and that
01:44:18 10 kind of stuff. And so we are -- for our named custodians, we
01:44:22 11 are pulling the expense reports for all the named custodians.
01:44:26 12 Those will be produced together as a group. The calendars for
01:44:30 13 the named custodians will be produced together as a group.

01:44:34 14 And things that would not be -- this is not something
01:44:36 15 -- an expense report we would not search for using search
01:44:40 16 terms. We would pull the expense reports of the named
01:44:42 17 custodians. So that's something we will be producing as part
01:44:44 18 of that third grouping, so to speak.

01:44:46 19 In addition to documents, there are a number of --
01:44:50 20 No. 8 is documents sufficient to identify current or former
01:44:56 21 officers, directors -- that's not a good one.

01:45:00 22 There are a number of them throughout the request
01:45:02 23 that say sufficient to show.

01:45:04 24 THE COURT: Okay.

01:45:04 25 MS. MILLER: It's usually dated information. So we

01:45:08 1 are collecting that information and producing that together as
01:45:10 2 a grouping.

01:45:12 3 And then the fourth grouping is the company has what
01:45:14 4 we call SharePoint, which is a specific program, and shared
01:45:18 5 drives, which is exactly what it sounds like, drives that are
01:45:22 6 shared by more than one person. And so we are in the process
01:45:24 7 of going -- figuring out the best way to go through those
01:45:30 8 shared drives and those SharePoint sites to collect
01:45:34 9 potentially responsive documents because there are some
01:45:36 10 technological hurdles associated with that, we are still in
01:45:40 11 the process, which is why we put it as No. 4.

01:45:42 12 When we were in our April 19th meet and confer, we
01:45:44 13 estimated at that point it would take between four and six
01:45:48 14 months to get everything complete and out the door. We are
01:45:50 15 trying to accelerate that to beat that estimate, but we didn't
01:45:52 16 want to promise something that would be next month and we
01:45:56 17 couldn't meet it.

01:45:58 18 THE COURT: So if, let's say, it did take September,
01:46:02 19 let's just say for the sake of discussion here September, does
01:46:08 20 that include privilege?

01:46:10 21 MS. MILLER: Does that -- the privilege log, you
01:46:12 22 mean?

01:46:14 23 THE COURT: Yes.

01:46:14 24 MS. MILLER: The privilege log would follow shortly
01:46:16 25 after --

01:46:16 1 THE COURT: Each one of the phases?

01:46:18 2 MS. MILLER: No, a privilege log is coming at the end

01:46:22 3 to cover the entire production.

01:46:22 4 THE COURT: Okay. Are each of them -- plaintiffs,

01:46:30 5 are each of the defendants doing production kind of the same

01:46:34 6 way, in phases like this -- not phases -- yeah, phases?

01:46:42 7 MR. WOZNIAK: I haven't been involved in all of those

01:46:46 8 discussions, but I think the answer is no. I mean, for

01:46:48 9 instance, PCA has represented that they are largely finished

01:46:50 10 with their production, with their most recent ESI production

01:46:54 11 we received just a week or so ago. There's a little bit of

01:47:00 12 staggering with each defendant, but I don't know --

01:47:04 13 MR. MAROVITZ: I think it's different. It varies. I

01:47:08 14 think it's defendant by defendant.

01:47:08 15 MR. WOZNIAK: And Dan can correct me if I'm wrong. I

01:47:12 16 don't think anyone has estimated -- that's not to say it's

01:47:14 17 necessarily outrageous or unheard of, but I think that the

01:47:18 18 four- to six-month estimate is the longest one we received

01:47:22 19 from any one defendant.

01:47:24 20 MR. MAROVITZ: And that's why we're trying to produce

01:47:24 21 it in stages. We are not producing everything at the end. We

01:47:28 22 are getting it to them in stages.

01:47:30 23 THE COURT: So which of you has PCA?

01:47:34 24 MR. WOZNIAK: No one here today has PCA.

01:47:40 25 THE COURT: So if you have all of PCA, then tell us

01:47:44 1 about your review, kind of what goes into that. I have never
01:47:50 2 done it.

01:47:50 3 MR. WOZNIAK: Of course, it's going to depend on the
01:47:52 4 overall volume.

01:47:54 5 THE COURT: Right.

01:47:54 6 MR. WOZNIAK: For PCA, the volume is probably --

01:47:58 7 MR. MOGIN: About a hundred thousand documents.

01:48:00 8 MR. WOZNIAK: Yeah, it's about a hundred thousand
01:48:02 9 documents.

01:48:04 10 THE COURT: Including email? That's everything?

01:48:06 11 MR. WOZNIAK: Yes. We are trying not to review every
01:48:08 12 single document that gets produced to us, at least not right
01:48:10 13 away. We have ways of focusing in --

01:48:12 14 THE COURT: Good.

01:48:14 15 MR. WOZNIAK: -- and trying to prioritize the
01:48:16 16 documents that get reviewed initially. So that process is
01:48:18 17 underway.

01:48:18 18 I know that at least with the April, the mid-April
01:48:24 19 PCA production that was made to us, those documents are being
01:48:26 20 reviewed, they are undergoing the first pass human review, the
01:48:32 21 ones that have been prioritized. The more recent production
01:48:34 22 has been loaded into our review platform, has not yet been
01:48:38 23 prioritized and batched out; but I would estimate if we were
01:48:42 24 looking at the entire production, the fact that we received
01:48:46 25 PCA a week or so ago, I think we could be largely finished

01:48:50 1 reviewing those documents by -- you know, I have to factor in
01:48:56 2 vacation schedules and the summer, but I would be surprised if
01:48:58 3 we are still reviewing PCA documents at the end of July.

01:49:04 4 THE COURT: So three months, maybe.

01:49:06 5 MR. WOZNIAK: There may be some residual.

01:49:10 6 MR. FREED: That may be ambitious.

01:49:14 7 MR. WOZNIAK: That's ambitious, but, again, that's a
01:49:14 8 hundred thousand documents from one defendant.

01:49:16 9 THE COURT: Then here's what -- the reason I'm asking
01:49:18 10 that is then I am expecting, on the issue of custodians, okay
01:49:26 11 -- well, two issues come at the end. I would think you're
01:49:28 12 going to have to come up -- we're going to have to have our
01:49:32 13 statistically valid verification ready to go by that, whatever
01:49:38 14 we're doing, and if you're going to ask for more custodians
01:49:42 15 based upon the review that you've done. And I haven't heard
01:49:46 16 any of the defendants say they would refuse. I mean, everyone
01:49:52 17 said, Sure, we will listen. Now, we'll see what that listen
01:49:56 18 means, but at least then it would be based on specific to us.
01:50:04 19 So that could be maybe July.

01:50:10 20 MR. WOZNIAK: Yeah, I would say end of July for PCA.

01:50:14 21 MR. MOGIN: So that you get perhaps a fuller picture,
01:50:16 22 your Honor, there are several aspects to the PCA review. And
01:50:22 23 PCA is an interesting example to focus in on because of their
01:50:26 24 relative size, so we can get to them pretty quickly relative
01:50:30 25 to the other defendants. There is not a lot of documents.

01:50:34 1 But here are some of the processes that we have to go
01:50:36 2 through. So it's not a question of just what we call linear
01:50:40 3 or human review document by document. That's one aspect of
01:50:44 4 it. Another aspect of it is the content-based analytics that
01:50:50 5 we are going to subject it to, which is done by another group.
01:50:56 6 The economic and financial documents get culled out to go to a
01:51:00 7 specialized review group as well because what's the point of
01:51:04 8 having attorneys review spreadsheets that can't even add, by
01:51:08 9 and large.

01:51:08 10 THE COURT: Right.

01:51:10 11 MR. MOGIN: And then there are various levels of
01:51:14 12 quality control that have to take place as well.

01:51:18 13 THE COURT: All right.

01:51:20 14 MR. MOGIN: And we have now the tool of the word
01:51:22 15 indexes and --

01:51:24 16 THE COURT: Is that going to help?

01:51:26 17 MR. MOGIN: With PCA, yes, because PCA is
01:51:30 18 particularly -- it's relatively easy to get a handle on. It's
01:51:34 19 one of the smaller word indexes that goes with one of the
01:51:36 20 smaller document productions. So they have roughly 350,000
01:51:42 21 words. Well, the word indexes are really helpful. So, for
01:51:46 22 example, during the break, I asked somebody to take a quick
01:51:50 23 look, because we were talking about committee before, and
01:51:54 24 could you look at Temple-Inland's word indexes and see how
01:51:56 25 many times "committee" was mentioned. And we've got a couple

01:51:58 1 of screen shots, it's the best we could do in a limited time,
01:52:02 2 but there are hundreds of references to committees in these
01:52:06 3 documents, if not thousands. I'm trying to interpret the
01:52:10 4 document myself.

01:52:14 5 But there's audit committee, there's subcommittee,
01:52:18 6 there's standard committee, there's legislative committee,
01:52:20 7 there's this committee, there's that committee. And so that's
01:52:24 8 one of the things that we can do with these word indexes.

01:52:30 9 But the word index is a relatively new tool, and we
01:52:34 10 just don't know quite how long it will take to cut through
01:52:36 11 PCA. We are trying some experiments --

01:52:38 12 THE COURT: Good.

01:52:38 13 MR. MOGIN: -- as we speak.

01:52:46 14 THE COURT: That could be our little guinea pig.

01:52:52 15 MR. WOZNIAK: I may have misunderstood your question.
01:52:54 16 I thought you were asking in the context of when would we be
01:52:58 17 ready to suggest more custodians. And in that sense, I do
01:53:04 18 think that we would be largely through, assuming that PCA has
01:53:06 19 in fact completed their production, I think that we would --
01:53:06 20 setting aside the economic-type documents that Mr. Megin
01:53:08 21 mentioned and the content-based analytics that we intend to
01:53:12 22 apply, I think we would be in a position to identify
01:53:16 23 additional custodians by the end of July.

01:53:18 24 MR. MOGIN: But understand that it's a subset because
01:53:20 25 those would only be people that were referenced in the

01:53:24 1 documents. So if somebody was excluded, say PCA's former
01:53:30 2 chairman, we won't have their documents.

01:53:34 3 THE COURT: Right.

01:53:36 4 MR. MOGIN: So we still do have to go through some
01:53:38 5 level of the custodian and litigation hold exercise with PCA,
01:53:44 6 although they are a relatively good lab rat for us.

01:53:58 7 THE COURT: When you are doing these economic folks
01:54:00 8 that are looking at that, that basically goes to damages? I
01:54:04 9 mean, are you dividing it between liability and damages?

01:54:06 10 MR. MOGIN: No, your Honor. It's an antitrust case.

01:54:08 11 THE COURT: They are all combined.

01:54:10 12 MR. MOGIN: Yes, the economics and the damages are --

01:54:14 13 THE COURT: Okay.

01:54:14 14 MR. FREED: But there's also fact damage or impact or
01:54:18 15 injury. Different words are used.

01:54:24 16 MR. VAN TINE: The sort of analysis that an expert
01:54:28 17 might choose to do in an antitrust case for liability per fact
01:54:38 18 of injury and for computation amount of damages is often done
01:54:48 19 with the same information, the same data.

01:54:52 20 THE COURT: Well, that's good. That's practical.

01:54:56 21 MR. VAN TINE: So they are very -- they can be
01:54:58 22 closely related depending on what the methodology of the
01:55:02 23 expert is.

01:55:04 24 MR. MOGIN: For shorthand, think of fact of injury or
01:55:10 25 antitrust injury; think of it in terms of causation.

01:55:14 1 THE COURT: Got it.

01:55:24 2 So you are not going to start depositions until we
01:55:28 3 have all of -- is that your present intent is not to start
01:55:32 4 depositions until we basically have these documents in hand,
01:55:38 5 at least phase one documents in hand?

01:55:40 6 MR. MOGIN: Well, not to any significant degree, but
01:55:42 7 I would like to talk with you a little bit about the phasing
01:55:46 8 notion. One of the issues, of course, is overall efficiency
01:55:54 9 because people have their review teams in place.

01:55:58 10 THE COURT: Right.

01:55:58 11 MR. MOGIN: But what I am particularly concerned
01:56:00 12 about, your Honor, is your Honor. You're going to leave.

01:56:08 13 THE COURT: I know.

01:56:08 14 MR. MOGIN: And then some other magistrate is going
01:56:10 15 to take over, and they will see what you have done, but they
01:56:16 16 won't -- it will now be their interpretation. And typically
01:56:22 17 when this happens, we start going down a completely different
01:56:26 18 path. Nobody ever intends it that way, but that is what
01:56:32 19 happens. And as we go down that path, the original intent
01:56:38 20 gets lost and a lot of the efficiencies get lost.

01:56:42 21 So while iterative is one thing, formalized phasing
01:56:46 22 is a different issue altogether.

01:56:48 23 MR. MAROVITZ: And we -- I can say without
01:56:52 24 hesitation, that we at Temple-Inland, and I believe this to be
01:56:56 25 true for the other defendants as well, would like to have as

01:56:58 1 many of these issues resolved by the time that you decide to
01:57:04 2 step down. We know how much time and effort you have put into
01:57:08 3 it.

01:57:08 4 THE COURT: I am running out the door.

01:57:14 5 MR. WOZNIAK: We need one more ruling. Don't go.

01:57:18 6 MR. MOGIN: Will you be leaving contact information?

01:57:20 7 MR. MAROVITZ: I think it's very important to us,
01:57:22 8 given the amount of time that you and your court have spent
01:57:28 9 and the parties have spent with you. We have had a lot of
01:57:32 10 thought about that.

01:57:38 11 Judge, just one thing. As much as Britt and I enjoy
01:57:42 12 answering questions about our production, we do have requests
01:57:46 13 to the plaintiffs as well.

01:57:46 14 THE COURT: Good. Can I say something --

01:57:48 15 MR. MAROVITZ: Sure.

01:57:50 16 THE COURT: -- on this? I hadn't brought this up,
01:57:52 17 and this is a little easier to talk when it's just a smaller
01:57:58 18 group.

01:58:02 19 So one possibility could be a special master if you
01:58:06 20 wanted consistency. I don't know -- we hardly in this
01:58:12 21 district use special masters at all. But if we were going to
01:58:16 22 continue to have e-discovery throughout, one of the things I
01:58:22 23 had thought of kind of seamlessly to be able to try to keep it
01:58:28 24 as seamless as possible would be, since Judge Shadur has
01:58:32 25 basically told you that he don't know too much about

01:58:34 1 e-discovery, okay, and I love that. I think when you're as
01:58:40 2 secure as he is, you can admit what he doesn't know. I think
01:58:44 3 we're going to have two great magistrate judges coming on
01:58:50 4 board. We will know who they are June 28th, so you don't have
01:58:54 5 to do -- I think they're going to be two really good civil
01:58:56 6 practitioners myself who are going to be up to date on
01:59:02 7 e-discovery, so I don't think it's going to be an issue,
01:59:04 8 regardless of who took over whose caseload.

01:59:08 9 So you would have hopefully -- and I mean this, I
01:59:14 10 think you are going to have two people that are going to be
01:59:16 11 perfect. You could consider -- and you could consider as a
01:59:20 12 group hiring a special master and just having them take you
01:59:26 13 all the way through the case.

01:59:28 14 Have you ever worked with a special master?

01:59:30 15 MR. MOGIN: Not happily.

01:59:34 16 THE COURT: Not happily. You know, I have heard
01:59:34 17 that. I have heard that. But I think of it more like a
01:59:36 18 special master who is going to do mediation, as much as
01:59:42 19 reports to Shadur but who is going to try to keep it going.

01:59:50 20 MR. MOGIN: My experience may be unique, it may be
01:59:52 21 more common. I have just not had great experiences with
01:59:54 22 special masters.

01:59:56 23 THE COURT: I am glad you're saying that. Our goal
01:59:58 24 is to literally -- part of why I am asking about this, Chris
02:00:04 25 hopefully will have -- Chris also hopefully will be one of the

02:00:08 1 law clerks to one of the two magistrate judges, and maybe
02:00:12 2 Margaret to the other one, so we are going to have a lot of
02:00:16 3 consistency.

02:00:20 4 MR. MOGIN: So it's not like in some civilizations
02:00:24 5 where somebody passes on to something new and then the old
02:00:26 6 person gets executed or something.

02:00:28 7 THE COURT: These guys love being clerks, and they
02:00:32 8 are just the most fabulous clerks in the world. They are two
02:00:36 9 folks who have made a career of it, and I could not have done
02:00:40 10 this without their having my back, as I say.

02:00:46 11 MR. MOGIN: Well, that breeds a lot more confidence
02:00:48 12 in the idea of continuity here.

02:00:50 13 THE COURT: It does. It does. So both Margaret and
02:00:54 14 Chris, and there will probably be one with each one. And
02:00:58 15 you're going to know -- this is the most civilized system in
02:01:02 16 the world. They walk in at 4:00 o'clock in the afternoon and
02:01:06 17 the judges vote that day, so you know who they are. It's not
02:01:08 18 like any of the Article III stuff, and you will know who the
02:01:14 19 folks are.

02:01:16 20 But this helps me -- now on phase one, Mr. Mogin, the
02:01:22 21 only thing I have been -- I think I would have a hard time
02:01:26 22 doing privilege, objections to privilege, because that takes
02:01:34 23 months and months and months, and somebody else could do that
02:01:38 24 without knowing the whole history here, I think.

02:01:40 25 I wanted to get you to agree with me on backup tapes.

02:01:46 1 If we have a flow going of active data, I thought -- and you
02:01:54 2 don't have to agree with me today, but we are talking about
02:01:56 3 when I was saying phase two, what I wanted to clarify today on
02:02:02 4 Temple-Inland is do you understand of what they're producing,
02:02:08 5 if they're active and inactive or backup tapes, do you
02:02:14 6 understand their system enough or do you need any more
02:02:18 7 information from them just informationally? Do you know
02:02:24 8 what's active and what's on backup tapes? I was reading one
02:02:30 9 the other day that has a great index to it. I don't know what
02:02:32 10 your system is like.

02:02:38 11 Do you have a preservation hold on your backup tapes
02:02:42 12 so that if somebody else is getting to it in a while, at least
02:02:46 13 is it being preserved, or is that too much to answer?

02:02:50 14 MS. MILLER: Yes. The answer is yes. The backup
02:02:54 15 tapes that were in place when the legal hold went into place
02:02:58 16 are being preserved. They are not being overwritten. And we
02:03:02 17 lay out in the January 10th letter how far back for various
02:03:06 18 systems we have backup tapes, and that's also a big topic in
02:03:08 19 the 30(b)(6).

02:03:10 20 THE COURT: Good. That's kind of what I assumed.

02:03:16 21 So, Mr. Temple-Inland, do you have any questions
02:03:18 22 about the backup tapes that you need more information on?

02:03:24 23 MR. VAN TINE: Well, there are questions that did
02:03:28 24 come up in the deposition, and there are questions that have
02:03:32 25 come up since then. Right now, Temple-Inland is taking the

02:03:36 1 position that it will not do anything to search or produce
02:03:42 2 documents from backup tapes. Certain information, certain
02:03:52 3 kinds of data, may only be on backup tapes, and some of that
02:04:08 4 information may also be on backup tapes or systems that
02:04:12 5 Temple-Inland claims it cannot retrieve the information
02:04:18 6 because they do not currently use the system.

02:04:24 7 There was -- there were some backup tapes identified
02:04:30 8 in the 30(b)(6) deposition at the mills that actually were not
02:04:36 9 being preserved, and that may be gone. The information on
02:04:40 10 those may have been overwritten since the litigation hold was
02:04:48 11 in place.

02:04:50 12 In addition, there were 766 backup tapes found in the
02:04:58 13 cubicle of a fired employee, and Temple-Inland, other than
02:05:10 14 some general categorization based on paper labels on
02:05:16 15 approximately 150 or somewhere between 150 and 200 of the 766
02:05:22 16 tapes, apart from some general handwritten two-word notes,
02:05:30 17 there's no index of that. I believe that Temple-Inland has
02:05:32 18 taken the position that generally with respect to its normally
02:05:36 19 kept backup tapes, that those -- that there isn't an index to
02:05:44 20 exactly what is on any of those and that they cannot be
02:05:48 21 searched either.

02:05:48 22 Now, we understand from our ESI consultant that, in
02:05:54 23 fact, a service exists that for \$50 a tape can at least tell
02:06:02 24 you generally what may be on the tape, but --

02:06:08 25 THE COURT: Is that a camera?

02:06:10 1 MR. VAN TINE: No, no. It would read the tape.
02:06:12 2 THE COURT: Oh, it would read the tape.
02:06:12 3 MR. VAN TINE: It would read the tape to some extent.
02:06:18 4 So there are issues here, and in part, this is what
02:06:26 5 -- this is part of the reason why this aggressive email
02:06:32 6 destruction policy is relevant to us because as we look back
02:06:36 7 in time for Temple-Inland, the amount of email that exists
02:06:44 8 goes down considerably. And although the emails may be gone,
02:06:52 9 there are backup tapes of what Ms. Miller refers to as loose
02:06:58 10 ESI, the word documents and things. There are backup tapes
02:07:02 11 for those that go back seven years.

02:07:10 12 In addition, I referred to there being some issues
02:07:12 13 with how some of the collection was done for Temple-Inland.
02:07:16 14 With respect to the individual -- with respect to people that
02:07:22 15 are not on their custodian list, 26 or 28 people, basically,
02:07:32 16 the litigation hold went out, and for the next six months,
02:07:38 17 they were collecting the information. It wasn't all collected
02:07:42 18 at once.

02:07:44 19 Now, the email that was on the email server, they may
02:07:50 20 have collected that all at the beginning in one fell swoop;
02:07:54 21 but with respect to what was on people's computers, basically,
02:08:00 22 they've been told that there is a -- well, we don't know
02:08:04 23 exactly what they were told, but they have been told something
02:08:06 24 about a lawsuit, something about what it might be about, and
02:08:08 25 we are going to come and get your data. And it may take six

02:08:12 1 months. You know, someone's computer may die, someone may
02:08:18 2 delete documents.

02:08:20 3 So we do have some issues where we would want to get
02:08:28 4 information off of backup tapes and think that it would be
02:08:32 5 appropriate in this suit.

02:08:34 6 THE COURT: Okay.

02:08:36 7 MR. MOGIN: Would it be possible to find out the name
02:08:38 8 of the employee who had contact information, the one who
02:08:44 9 squirreled away all those backup tapes?

02:08:46 10 MS. MILLER: Just to give some background, the 766
02:08:50 11 backup tapes belonged to -- were in the cubicle of a person
02:08:52 12 who used to work on the systems that created those tapes. We
02:08:56 13 don't use that system anymore, and so that person's job was
02:08:58 14 eliminated because we don't use the system that he was
02:09:02 15 responsible for working with.

02:09:02 16 So fired employee is a little bit much. His job was
02:09:08 17 phased out because what the company did no longer needed his
02:09:12 18 services.

02:09:12 19 So the 766 were in his cubicle because those were the
02:09:20 20 systems that he worked with, so it wasn't some random person
02:09:24 21 squirreling away backup tapes. I don't know his name as I sit
02:09:26 22 here. That's the 766.

02:09:28 23 I am happy to spend some time talking to some of the
02:09:30 24 points that Mr. Van Tine raised which I take issue with in
02:09:34 25 terms of how long it took us to collect things and whatnot. I

02:09:38 1 mean, the reality is you can't -- the purpose of sending out a
02:09:40 2 legal hold is to get everybody to stop deleting things, but
02:09:44 3 you can't collect every piece of paper and every single
02:09:48 4 electronic thing on the instantaneous moment the complaint was
02:09:50 5 filed, so, yes, it took us some time to collect everything.
02:09:52 6 But we have a significant amount of active data that we have
02:09:56 7 collected and preserved, and as evidenced by the numbers which
02:10:00 8 we won't talk about of the materials that we have produced, it
02:10:04 9 demonstrates how much active systems that we are still
02:10:06 10 producing. We still have several more groupings of documents
02:10:10 11 coming off of active systems that we have yet to produce.

02:10:14 12 THE COURT: Here is a question that I have.

02:10:14 13 MS. MILLER: Sure.

02:10:16 14 THE COURT: Even after you did the first grouping,
02:10:18 15 the second grouping, the litigation hold continues on; you're
02:10:22 16 not removing that litigation hold after you complete one of
02:10:28 17 these segments?

02:10:28 18 MS. MILLER: Well, we have agreed on -- the parties
02:10:32 19 have agreed -- we are still fighting on the front end on some
02:10:36 20 time period, but there is largely agreement on the back end.
02:10:38 21 So stuff that's like created today isn't preserved.

02:10:44 22 THE COURT: Okay. You're right.

02:10:46 23 Speaking of time periods, have you been meeting and
02:10:50 24 conferring on time periods? And what is Temple-Inland's -- do
02:11:02 25 you have it divided between content?

02:11:04 1 MS. MILLER: Conduct.

02:11:06 2 MR. MOGIN: Conduct.

02:11:06 3 THE COURT: Conduct and --

02:11:10 4 MS. MILLER: Conduct and data.

02:11:10 5 THE COURT: The plaintiffs want what for conduct?

02:11:14 6 MR. MOGIN: With respect to conduct, with one small

02:11:16 7 exception, which I will come back to, we want from -- our

02:11:20 8 original request was from 2002 through the end of the class

02:11:24 9 period.

02:11:28 10 THE COURT: Which is the filing of the complaint,

02:11:32 11 yes?

02:11:32 12 MR. MOGIN: For practical purposes, yes.

02:11:34 13 THE COURT: Okay.

02:11:34 14 MR. MOGIN: I say "for practical purposes" because

02:11:38 15 that's not quite how the class period is defined. It goes

02:11:42 16 through present time.

02:11:44 17 However, we had agreed that we would parrot back to

02:11:50 18 2003, and that's been our position consistently, but that was,

02:11:58 19 of course, subject to agreement on the data time period. The

02:12:04 20 data time period, we originally wanted 10 years, so that would

02:12:08 21 go to '95, but I was able to pare it back to 2000. So a

02:12:18 22 five-year before period and then a five-year conspiracy period

02:12:22 23 and then we wanted a short after period. So, yes, we will

02:12:24 24 want after period data.

02:12:34 25 And the reason for that is our experts need to create

02:12:36 1 a but-for world. There will certainly be a Daubert challenge.
02:12:42 2 If it's a five-year but-for world, we need a five-year before
02:12:46 3 period. They prefer 10, but you know how experts are, so I
02:12:52 4 got them pared back to five.

02:12:56 5 MR. MAROVITZ: Judge, as a reminder, we had offered
02:12:58 6 to agree on conduct to 2003 if the plaintiffs will take off
02:13:04 7 the table the off-line and off-line data and backup tapes.

02:13:10 8 THE COURT: I see.

02:13:10 9 MR. MAROVITZ: We made that offer a number of times,
02:13:14 10 and I don't think we have heard back one way or the other on
02:13:18 11 that.

02:13:24 12 On the data, our proposal I think was 2003, and that
02:13:30 13 would provide more than two years of pre-period data, which is
02:13:34 14 ample. It is true, as Mr. Mogin said, that economists want as
02:13:42 15 much data as is humanly possible, but that doesn't make it
02:13:46 16 relevant or necessary in a case, and additional data brings
02:13:50 17 additional burdensome costs. So that's where we are in
02:13:54 18 connection with those two points.

02:13:58 19 MR. MOGIN: One thing that I had a couple of points
02:14:00 20 there, your Honor. I think I have made it pretty clear that
02:14:04 21 I'm uninterested in being leveraged on those backup tapes.

02:14:08 22 THE COURT: Right.

02:14:08 23 MR. MOGIN: Secondly, with respect to the data, I had
02:14:14 24 offered some time ago that if the defendants were willing to
02:14:18 25 stipulate that they wouldn't raise objection to our expert's

02:14:22 1 calculation based upon a shorter time period, that we would
02:14:24 2 consider it. And I received an unequivocal no, that they
02:14:30 3 weren't prepared to do that.

02:14:32 4 THE COURT: You're not saying -- they could object on
02:14:36 5 any other level, but not object based solely on time?

02:14:40 6 MR. MOGIN: Right. They couldn't say that your
02:14:42 7 expert's model is no good because it's only two years.

02:14:46 8 MR. MAROVITZ: And I am not criticizing Mr. Megin for
02:14:48 9 this: Mr. Megin probably doesn't know his expert's model yet
02:14:54 10 because he doesn't have all the data. Nobody knows that yet.
02:15:00 11 So there are a variety of ways that experts can construct
02:15:02 12 models in this cases.

02:15:02 13 So the fact is that a request for 10 years of
02:15:06 14 pre-period data, which the plaintiffs' economists, together
02:15:14 15 with Mr. Megin, had made is unprecedented. I am glad he drew
02:15:18 16 it back to five years, but that is still an enormous time
02:15:20 17 period for the pre-period in this case.

02:15:24 18 MR. MOGIN: Respectfully, it's not unprecedented. We
02:15:26 19 certainly have Northern District of Illinois cases that go
02:15:30 20 back further than that. We may even have Judge Shadur cases
02:15:32 21 that go back further than that.

02:15:34 22 THE COURT: Well, that's going to be something. I
02:15:36 23 mean, I like this idea of throwing out, you know, sort of like
02:15:38 24 what you did, if you give up -- I mean, I think individual
02:15:42 25 deals isn't such a bad thing. It could move the ball along,

02:15:48 1 and if you had wanted to give up the backup tapes or if they
02:15:52 2 wanted to give up the backup tapes, that wouldn't have been
02:16:00 3 bad. I do in class, I have so many class cases, that I
02:16:02 4 definitely try to convince the defendants to stipulate to one
02:16:06 5 or two of the elements.

02:16:08 6 Are you using -- is this a 23 class? It is. I mean,
02:16:14 7 I have been doing this more and more lately. I am trying to
02:16:16 8 get people to stipulate to one or two elements and then get
02:16:20 9 down to really what the issue is. And I have really been
02:16:22 10 getting some takers lately because --

02:16:24 11 MR. MOGIN: I am pretty sure they will stipulate on
02:16:28 12 numerosity.

02:16:28 13 THE COURT: No, but that's even a big thing. That
02:16:30 14 would even be a big thing that takes one thing off the table.

02:16:36 15 MR. FREED: Our proposal to Mr. Marovitz, however,
02:16:38 16 would have to be accepted by all the defendants. If he were
02:16:40 17 to say, That's fine, Temple-Inland will agree with that, we
02:16:42 18 still wouldn't be --

02:16:44 19 THE COURT: I just wrote a note to myself, probably
02:16:46 20 needs some legal ruling on this time thing because you are
02:16:50 21 going to probably need one scope.

02:16:54 22 MR. FREED: Right.

02:16:54 23 THE COURT: I think everybody is going to have to
02:17:02 24 agree to the same time frame.

02:17:04 25 MR. MOGIN: That's true, and the time period --

02:17:04 1 THE COURT: So then maybe that's when we don't spend
02:17:06 2 a lot of time -- I mean, we just say, Okay, that goes --

02:17:08 3 MR. FREED: We have been at issue on that, I would
02:17:10 4 say, for six or more meet and confers.

02:17:14 5 THE COURT: This is the rule: If it takes more than
02:17:18 6 six or more meet and confers, give it to the judge.

02:17:22 7 MR. FREED: There hasn't been any acrimony. It's
02:17:26 8 just --

02:17:26 9 THE COURT: Right. So the index, I wanted to know if
02:17:30 10 that index, are we calling it a word -- what are we calling it
02:17:32 11 now? It's not a word dictionary. A word index? Is that what
02:17:36 12 we're calling it?

02:17:36 13 MS. MILLER: That's what we called ours when we
02:17:40 14 produced it.

02:17:40 15 THE COURT: So are you satisfied with their word
02:17:42 16 index? Have you taken a look at that?

02:17:44 17 MR. MOGIN: No, we are not satisfied, because they
02:17:50 18 have the ability to tell us words that were used in documents
02:17:54 19 that were not produced, and they haven't done that. They have
02:18:02 20 culled that out. They have the ability to tell us words that
02:18:04 21 were used -- words that were used in non-hits. So, in other
02:18:06 22 words, a search term may or may not hit on a document.

02:18:16 23 THE COURT: Okay.

02:18:16 24 MR. MOGIN: But that's a separate issue from what
02:18:20 25 words were used in that document. So we need to know the

02:18:24 1 words that were used in the non-hits. That doesn't reveal to
02:18:28 2 us much about the content or context of the documents, but we
02:18:30 3 need to know so that we can have some understanding of how
02:18:34 4 effective are the search terms.

02:18:38 5 MS. MILLER: Just one quick note of clarification.
02:18:40 6 The last part of what Mr. Mogin said was absolutely correct.
02:18:44 7 The first part was slightly inaccurate. Our word index gives
02:18:48 8 not just the words that are contained in documents that we
02:18:50 9 have produced. It is all the words contained in documents
02:18:52 10 that were hit by one of our search terms, so the ones that
02:18:56 11 were produced and the ones that were not produced.

02:18:58 12 So as we detailed in our letter when we produced it,
02:19:02 13 our word index includes words that are included in all of the
02:19:06 14 documents that were hit by one of our search terms.

02:19:08 15 So produced and not produced. He is correct, it does
02:19:10 16 not include ones that were not hit by a search term.

02:19:14 17 THE COURT: Did PCA give you -- this perfect little
02:19:18 18 PCA that isn't at our table.

02:19:20 19 MR. MOGIN: The defendants are uniform with respect
02:19:22 20 to that, except Georgia-Pacific and one other defendant, and I
02:19:30 21 don't know whether it was Temple as I sit here because I am
02:19:34 22 drawing a blank, were unable to produce one of the categories
02:19:40 23 of documents.

02:19:40 24 MS. MILLER: Not us.

02:19:42 25 MR. MOGIN: Not you.

02:19:42 1 MS. MILLER: In terms of the columns?

02:19:44 2 MR. MOGIN: Yeah.

02:19:44 3 MS. MILLER: No, we were able to produce all three.

02:19:46 4 I have an excerpt if you would like to see it.

02:19:50 5 MR. MOGIN: So they are a three-column defendant, so

02:19:54 6 that was the best any defendant did was the three columns.

02:19:56 7 MR. MAROVITZ: So we get an A plus in that.

02:20:00 8 MR. MOGIN: For columns.

02:20:00 9 MR. MAROVITZ: End of the semester, I will take

02:20:02 10 whatever.

02:20:02 11 MR. MOGIN: How you got to 3.5 million words is an

02:20:06 12 interesting issue, but we are still missing the non-hit docs.

02:20:14 13 MR. MAROVITZ: And that is, Judge, from our

02:20:14 14 perspective, any word index that gets generated that contains

02:20:20 15 three and a half million words is plenty of words. If the

02:20:24 16 plaintiffs want to use that word index to check to see what

02:20:30 17 words are and are not contained in the documents that we

02:20:32 18 produced, you know, they have those three and a half million

02:20:36 19 lines, and then they have several million lines from another

02:20:40 20 defendant, and I think in total, they have something like 25

02:20:42 21 million lines?

02:20:42 22 MS. MILLER: More than that.

02:20:44 23 MR. MAROVITZ: Now, there's surely some duplication,

02:20:48 24 but that sort of quantity of words in an index, there is

02:20:54 25 plenty of information there.

02:20:56 1 Now, let me just add one other little thing to that.

02:21:00 2 I will stop.

02:21:02 3 THE COURT: What are you using this for?

02:21:06 4 MR. MOGIN: Several things.

02:21:06 5 THE COURT: Okay. What are they?

02:21:08 6 MR. MOGIN: For example, we found Weyerhaeuser, just

02:21:16 7 in the PCA documents. We found maybe another dozen

02:21:18 8 references, names for Weyerhaeuser, that were not in the

02:21:22 9 search terms, just names, abbreviations, what have you.

02:21:28 10 That's just Weyerhaeuser. That's a dozen of them.

02:21:30 11 THE COURT: Okay.

02:21:30 12 MR. MOGIN: So that's one way we used them.

02:21:34 13 Again, with respect to the non-hits, how will we test

02:21:40 14 the efficiency of the search terms without knowing what was

02:21:44 15 missed? They are not giving us the documents; they are just

02:21:48 16 giving us words. It's not as if we can take those words and

02:21:54 17 piece together a document. That would be an impossibility.

02:21:58 18 But it will give us some idea of what the search strings

02:22:04 19 aren't getting.

02:22:04 20 MR. MAROVITZ: And this is the point, Judge, where

02:22:06 21 the plaintiffs and the defendants just have a fundamental

02:22:08 22 disagreement. I want to be crystal clear. We believe that

02:22:12 23 the testing that's been done is more than sufficient and that

02:22:18 24 it is not appropriate for there, months from now, to be yet

02:22:26 25 another set of testing by using documents and terms that

02:22:28 1 weren't contained in any corpus.

02:22:32 2 The fact that we have had a couple days of testimony
02:22:36 3 about it, we've laid bare in any transparent approach, I
02:22:42 4 understand Mr. Mogin and other plaintiffs' counsel disagree.
02:22:46 5 I just want the record to be clear that from our perspective,
02:22:50 6 his methodology has undergone a far more substantial testing
02:23:00 7 and review than nearly any other case that I have been
02:23:02 8 involved in.

02:23:02 9 THE COURT: Since none of the other cases have ever
02:23:06 10 done testing. I mean, that's true, Mr. Marovitz. They just
02:23:10 11 haven't. Which is why your homework was for coming back to
02:23:16 12 the next general meeting was I wanted to hear from people what
02:23:22 13 you thought at the end of phase one, which maybe I wasn't when
02:23:30 14 I sent it out, I wanted to hear your proposals on what kind of
02:23:34 15 testing we could do at the end of phase one because hopefully
02:23:42 16 we could get some agreement, and maybe people will say what we
02:23:46 17 have done already is sufficient.

02:23:50 18 But I think we could also -- since I believe,
02:23:52 19 honestly, unless you are very different than my word search
02:23:58 20 cases have gone, I haven't seen any testing in any case. Now,
02:24:08 21 I think people may have done it internally so they don't get
02:24:10 22 caught at the end of the case, but, I mean, to me, a real
02:24:18 23 contribution of the work we are doing here would be to propose
02:24:20 24 something that people could do that you could live with.

02:24:22 25 MR. MAROVITZ: We started talking about it --

02:24:24 1 THE COURT: Yeah.

02:24:24 2 MR. MAROVITZ: -- among the defendants.

02:24:26 3 THE COURT: The defendants, right.

02:24:26 4 MR. MAROVITZ: We will remind folks before our next

02:24:28 5 general conference to do that, but I just wanted the record to

02:24:32 6 be clear on our view.

02:24:34 7 THE COURT: Now, do you guys -- "you guys" being

02:24:44 8 Ms. Miller and Mr. Marovitz -- have any requests of the

02:24:48 9 plaintiffs? So when are the plaintiffs turning over your

02:24:50 10 materials to them, and how far have you -- you know, are you

02:24:54 11 going to do 30(b)(6)s of their point? I mean, what are you

02:25:02 12 doing about the stuff, since they're corporations too, right?

02:25:08 13 MR. MAROVITZ: There was one 30(b)(6) deposition of

02:25:12 14 Chandler, one of the plaintiffs, and I don't want to steal the

02:25:16 15 thunder of Georgia-Pacific, who undoubtedly will talk to you

02:25:20 16 about that tomorrow because I think they put it on their list.

02:25:22 17 So I am sure they will talk about that.

02:25:24 18 THE COURT: Have you made any requests of them that

02:25:26 19 you'd like any help with or you want to talk about while

02:25:30 20 you're here?

02:25:30 21 MR. MAROVITZ: We've made document production

02:25:32 22 requests to the plaintiffs. We've had a meet and confer or

02:25:36 23 two meet and confers. Those were reflected in the letters

02:25:42 24 that I pointed out earlier today. We have the time line --

02:25:46 25 actually, it's probably worth turning to it. A time line that

02:25:50 1 we have attached as the last page of Exhibit 11 shows the
02:25:56 2 chronology for our document production requests to the
02:26:00 3 plaintiffs, and it shows that plaintiffs have made some
02:26:08 4 production, I guess, on August 10th of 2011, and then Mighty
02:26:14 5 Pac made a production on November 1st, and Chandler made a
02:26:16 6 production on February 1st.

02:26:18 7 MS. MILLER: It's the last page of that, your Honor.

02:26:26 8 MR. MAROVITZ: And at the last status conference, I
02:26:30 9 think we were told that the plaintiffs had their
02:26:36 10 electronic-stored information in process, so I gather that's
02:26:42 11 somewhere between them and their vendor, but it would be
02:26:44 12 helpful for us to know for planning purposes when we might
02:26:46 13 expect that and how much there is.

02:26:54 14 MR. WOZNIAK: I will try to address whatever
02:26:56 15 questions come up on this point because I have sort of become
02:26:58 16 the point person for the plaintiff, ESI, and other documents.
02:27:02 17 I want to point out that while we did not object to including
02:27:04 18 this as a topic for today, in some ways, we think it's
02:27:08 19 inappropriate because none of the defendants have reached out
02:27:10 20 to meet and confer with us on any of these issues, with the
02:27:12 21 exception of -- I brought some letters with me. There was a
02:27:18 22 letter from Mr. Eimer on behalf of all defendants back in
02:27:24 23 early February asking us where we stood in terms of searching
02:27:30 24 for and producing electronic documents, and we responded to
02:27:32 25 that letter the next week by his requested deadline. And then

02:27:36 1 there was an exchange of letters following the Chandler
02:27:40 2 30(b)(6) deposition between Mr. Neuwirth's firm and my firm,
02:27:46 3 and those have been -- those letters have been the extent of
02:27:50 4 any discussions that have taken place, to my knowledge, over
02:27:54 5 the past many months.

02:27:54 6 Now, having said that, I am happy to let you know
02:27:58 7 exactly where we stand and when we expect to produce
02:28:00 8 documents, and I can even -- it might be helpful to sort of
02:28:04 9 step back and explain how we got to where we are now. And
02:28:08 10 part of that is that before I sort of took over this point
02:28:12 11 person role, we had commenced the process of using
02:28:18 12 content-based analytics for purposes of analyzing and
02:28:22 13 processing and producing ESI on behalf of our named
02:28:26 14 plaintiffs.

02:28:32 15 THE COURT: Here's a question. Are you using it on
02:28:34 16 your documents you are turning over to them, or are you using
02:28:36 17 it on the documents they turned over to you?

02:28:40 18 MR. WOZNIAK: Both.

02:28:42 19 MR. MOGIN: Yes.

02:28:44 20 MR. WOZNIAK: Both and both. We are using it for
02:28:48 21 purpose of locating and then assessing --

02:28:50 22 THE COURT: So it's a form of --

02:28:54 23 MR. WOZNIAK: I wouldn't -- I don't want to label it
02:28:56 24 as predictive coding. It's close to that. It's content-based
02:29:00 25 analytics. It's similar to the predictive coding process that

02:29:04 1 we talked about --

02:29:04 2 THE COURT: Do they have to have the machinery in
02:29:06 3 order to read it?

02:29:08 4 MR. WOZNIAK: No. They won't need anything more than
02:29:12 5 they would need --

02:29:12 6 THE COURT: All right.

02:29:14 7 MR. WOZNIAK: The format that we had ultimately
02:29:14 8 produced documents in will be subject to -- dictated by the
02:29:18 9 ESI production format stipulation.

02:29:20 10 THE COURT: Okay.

02:29:22 11 MR. WOZNIAK: So, in essence, we will be giving them
02:29:24 12 the same kind of information data that they provide to us when
02:29:26 13 they produce documents, or similar.

02:29:28 14 THE COURT: So your folks, your CBAA folks, are
02:29:34 15 putting together your documents or they are in the process of
02:29:38 16 putting your class people's documents together to give to
02:29:46 17 them. Is it the same document request for all seven, or did
02:29:50 18 you get seven separate documents?

02:29:52 19 MR. WOZNIAK: We received one set of document
02:29:56 20 requests to all of our plaintiffs.

02:29:58 21 And I would point out that the time line, the
02:30:00 22 chronology that was provided to you by Temple-Inland's
02:30:02 23 counsel, indicates that we have produced I think 45,000-some
02:30:08 24 documents. We believe that's going to be the bulk of what our
02:30:12 25 plaintiffs produce in this case. A few of them have rather

02:30:16 1 large ESI collections, but we think that what we are going to
02:30:20 2 see and what we have been seeing are largely duplicative-type
02:30:24 3 documents, so they may get more volume for -- they are going
02:30:30 4 to get more volume for likely all of our plaintiffs. Whether
02:30:32 5 that's merely cumulative or essentially duplicative remains to
02:30:38 6 be seen. I suspect that it's going to be largely
02:30:44 7 cumulative and duplicative. I don't think we are going to see
02:30:46 8 a lot of unique-type documents that they haven't already seen
02:30:50 9 because they have been provided with all of our purchase
02:30:52 10 records that we were able to find in terms of hard copy
02:30:56 11 purchase records.

02:30:56 12 And I would also add that the analytics that we're
02:31:00 13 applying, we started that process several months ago. We sort
02:31:04 14 of put it on hold pending the outcome of the evidentiary
02:31:06 15 hearings, and we told defendants as much.

02:31:10 16 We then had to make a decision at some point when it
02:31:14 17 became clear that our request for content-based analytics was
02:31:18 18 sort of at least being put on hold.

02:31:22 19 THE COURT: Right.

02:31:22 20 MR. WOZNIAK: We had to make a decision as to whether
02:31:24 21 we simply wanted to use Boolean search terms on our own
02:31:28 22 plaintiff ESI or continue down the CBA path that we had
02:31:32 23 started. We ultimately decided, for many reasons, primarily
02:31:36 24 efficiency reasons, we had already started down that path, but
02:31:40 25 also because we believe in the approach.

02:31:40 1 THE COURT: I know.

02:31:42 2 MR. WOZNIAK: And, quite frankly, we want to see how
02:31:44 3 well it works so the next time this comes up, we can say,
02:31:48 4 based on personal experience, this is what we have done, this
02:31:50 5 is how it works.

02:31:52 6 So having said all that, I think we will be in a
02:31:54 7 position, I know that our vendor already sent very recently a
02:31:58 8 number of document hits that we are in the process of starting
02:32:02 9 to assess for responsiveness. We are also going to be
02:32:06 10 tracking statistically I guess the testing methodology. We
02:32:12 11 have a large sample size that's being assessed for
02:32:16 12 responsiveness. We are tracking all the metrics. We are
02:32:18 13 basically going to try to do everything that we outlined --

02:32:22 14 THE COURT: Suggested.

02:32:22 15 MR. WOZNIAK: -- and suggested to defendants.

02:32:24 16 THE COURT: So you are not using custodian based,
02:32:26 17 you're using -- so let's take an example. What's one of your
02:32:30 18 plaintiffs? I don't even know who they are.

02:32:32 19 MR. WOZNIAK: Sure. I'll take the one with the
02:32:34 20 largest amount of ESI is probably Mighty Pac.

02:32:36 21 THE COURT: Mighty Pac. Okay. So you are searching
02:32:38 22 by department, not by custodian?

02:32:44 23 MR. WOZNIAK: What happened with respect to all of
02:32:44 24 our plaintiffs is that essentially all -- the ESI that was
02:32:50 25 collected was collected on a very broad sort of company-wide

02:32:54 1 basis.

02:32:54 2 THE COURT: Okay.

02:32:56 3 MR. WOZNIAK: I guess you could say function, it was
02:32:58 4 based on corporate function.

02:32:58 5 THE COURT: What's your time frame?

02:33:00 6 MR. WOZNIAK: Time frame?

02:33:00 7 MR. MOGIN: Your Honor, you should understand the
02:33:04 8 relative size of these companies. These are very small
02:33:06 9 companies as compared to Temple-Inland. Mighty Pac may be
02:33:10 10 among the larger, and I think that their total ESI was
02:33:14 11 something like 80,000 documents or something like that.

02:33:18 12 MS. MILLER: 80,000 documents?

02:33:20 13 MR. MOGIN: 80,000 emails total for the whole
02:33:24 14 company, for the whole class period.

02:33:28 15 MR. WOZNIAK: And that's our largest company. On the
02:33:28 16 other end, we have some very small outfits that may have a
02:33:32 17 couple of emails.

02:33:34 18 THE COURT: So what year are you -- I mean, I was
02:33:36 19 just wondering if you're doing the same years that you want
02:33:38 20 from them?

02:33:40 21 MR. WOZNIAK: We used the years that were defined in
02:33:42 22 the defendants' document requests, and in some cases, we went
02:33:48 23 beyond that just because it was easier to do.

02:33:50 24 THE COURT: Okay.

02:33:50 25 MR. WOZNIAK: And some of our companies had never

02:33:52 1 deleted anything, so we were able to find emails that may go
02:33:56 2 back further beyond that time period.

02:33:58 3 But certainly as we've advised defendants, all of our
02:34:02 4 plaintiffs have put in place preservation measures, and
02:34:06 5 nothing has -- so we have covered all of our steps.

02:34:10 6 THE COURT: Okay.

02:34:12 7 MR. MAROVITZ: Judge, just for planning purposes, we,
02:34:14 8 would just like to know about when we are going to get it.

02:34:18 9 MR. WOZNIAK: I would say -- it's a hard -- it's a
02:34:24 10 really hard question to answer. I would expect -- I had
02:34:30 11 hoped, quite frankly, when I took over this role that by now,
02:34:34 12 we would have begun or been largely completed with our
02:34:36 13 production, so I'm hopeful that within the next few weeks.

02:34:42 14 MR. MOGIN: We can say that we are confident that you
02:34:44 15 will get it before we get Temple-Inland's privilege log.

02:34:48 16 MR. WOZNIAK: Absolutely.

02:34:50 17 MR. MAROVITZ: That's really not -- we have produced
02:34:52 18 more than a million pages. And you're quite right; the fact
02:34:56 19 is that your companies are smaller. And so, frankly, the
02:35:00 20 discovery in this case has been extremely one-sided, and I
02:35:10 21 recognize in antitrust cases that that happens sometimes, but
02:35:14 22 we are entitled to get the discovery that we requested too,
02:35:18 23 and I sometimes fear that we forget that.

02:35:20 24 THE COURT: So, again, under my rubric of phase one,
02:35:22 25 I am hoping that this is going to be coming much sooner rather

02:35:26 1 than later, because if we need further meet and confers, I
02:35:32 2 mean, part of this also is they need to see it. If you need
02:35:34 3 any help --

02:35:38 4 MR. WOZNIAK: Let me go back to reiterating, though.
02:35:40 5 What we are going to see -- I mean, they know what we have
02:35:46 6 produced so far, and they know what they are going to see
02:35:48 7 coming. It's going to be more of the same. The fact is, yes,
02:35:52 8 it's taking us a little bit longer than I would like, but part
02:35:56 9 of that is because we were caught up in three months of
02:35:58 10 evidentiary hearings, during which time we were sort of
02:36:00 11 putting everything on hold.

02:36:02 12 THE COURT: Right. So sooner rather than later.

02:36:06 13 Okay. Anything else?

02:36:10 14 MR. MOGIN: I would like to go back to the backup
02:36:14 15 issue, and I was serious about asking for the identity of the
02:36:18 16 person who had those backup tapes that were found in the
02:36:20 17 cubicle.

02:36:24 18 THE COURT: That can be the post script of this case,
02:36:28 19 who was that person. I always envisioned that -- see, now
02:36:32 20 here's where -- sitting in my chambers, I have this vision of
02:36:36 21 these backup tapes being like a science fiction kind of movie.
02:36:46 22 I had no idea. I did. I thought they were going to be these
02:36:50 23 huge reel-to-reel kind of things.

02:36:52 24 MS. MILLER: Not anymore.

02:36:52 25 MR. MAROVITZ: The robot in Lost in Space.

02:36:54 1 THE COURT: No, I could just envision that.

02:37:00 2 Are you willing to at least entertain the thought?

02:37:02 3 Talk to your client or whatever you want to do on identifying

02:37:06 4 this person.

02:37:08 5 MR. MAROVITZ: We will take it under advisement,

02:37:10 6 Judge.

02:37:10 7 THE COURT: There you go.

02:37:12 8 All right. Let's see what else I have here. We

02:37:46 9 actually covered a number of things we hadn't talked about

02:37:50 10 before, so I am glad about that.

02:37:52 11 Mr. Mogin sent us a -- when Chris sent his out,

02:38:06 12 Mr. Mogin sent back time periods for defendants' responses to

02:38:10 13 the RPDs. Now, you have actually gotten an original response

02:38:16 14 from everybody on the RPD, I assume. I mean, I looked at

02:38:22 15 them.

02:38:22 16 MR. MOGIN: I'm sorry, your Honor?

02:38:24 17 THE COURT: Time periods for defendants' responses to

02:38:28 18 the RPDs.

02:38:30 19 MR. MOGIN: Those were the time period issues we were

02:38:32 20 discussing before.

02:38:32 21 THE COURT: Not anything different. Organization

02:38:36 22 correlation of search strings to RPDs.

02:38:48 23 Do you have any thoughts on that for Temple-Inland?

02:38:52 24 MR. MAROVITZ: I don't think that Temple-Inland's

02:38:52 25 position on that is different than anybody else's on the

02:38:56 1 defense side, and I think we have covered that in part today,
02:38:58 2 and we certainly covered it last time. I don't think there is
02:39:02 3 anything new.

02:39:04 4 THE COURT: I think I keep hunting because I don't
02:39:12 5 quite -- you know, I had thought after convening this, if it
02:39:18 6 would have been helpful to bring either an e-discovery liaison
02:39:28 7 and tech person to the meeting to talk about some of these
02:39:32 8 things if we were to do this again. Do you think that would
02:39:38 9 help, or do you think you're all agile enough that you
02:39:40 10 understand how to do these things?

02:39:44 11 MR. MOGIN: Based on today's discussion? I think we
02:39:48 12 didn't need the help.

02:39:48 13 MS. MILLER: No.

02:39:50 14 THE COURT: You didn't need the help.

02:39:50 15 MR. MOGIN: Not based on today. We have had plenty
02:39:54 16 of input along the way.

02:39:54 17 THE COURT: When you have your private meet and
02:39:56 18 confers, do you bring your tech people with you?

02:39:58 19 MR. MOGIN: We do. The defendants haven't, but we
02:40:00 20 have brought ours.

02:40:02 21 MR. MAROVITZ: We have not, but we have been in
02:40:04 22 contact with ours.

02:40:04 23 THE COURT: Because of everything, I do not -- I know
02:40:10 24 what Mr. Mogin keeps saying. It's not that I don't get the
02:40:14 25 words. But I don't get how you would do this. I mean, I hope

02:40:18 1 you know more than -- I mean, if you're saying no, I hope you
02:40:24 2 at least understand what you're saying no to because I don't
02:40:28 3 get it.

02:40:28 4 MS. MILLER: We do.

02:40:28 5 THE COURT: I don't get it. Okay.

02:40:30 6 MR. MOGIN: Your Honor, you seem to be winding down.

02:40:34 7 THE COURT: I am.

02:40:34 8 MR. MOGIN: I have something here that I was able to
02:40:38 9 get during the break. Unfortunately, it's just on my iPad. I
02:40:40 10 wonder if I can show this around.

02:40:42 11 MS. MILLER: I don't know what it is.

02:40:44 12 MR. MOGIN: Well, these are from the word indexes.

02:40:46 13 THE COURT: Okay.

02:40:46 14 MR. MOGIN: This is from Temple-Inland's word index,
02:40:50 15 and it's what we could do in our 45 minutes. And we were able
02:40:52 16 to find, I can't tell if it's 47 hits or 147 hits, on the word
02:41:00 17 "committee," and that's with a proper spelling. No
02:41:02 18 abbreviation or anything like that. And it reveals the use of
02:41:08 19 the term in a number of different contexts, and perhaps this
02:41:14 20 would be useful to you.

02:41:14 21 THE COURT: Okay.

02:41:18 22 MR. MOGIN: I am going to step around.

02:41:18 23 THE COURT: Sure. Come on over. Then you guys can
02:41:22 24 see.

02:41:22 25 MR. MOGIN: You can take a look.

02:41:28 1 So these are screen shots. Unfortunately, I can't
02:41:30 2 scroll down, so think of this as being a photograph of what
02:41:34 3 somebody saw on their screen. And you see up here the
02:41:38 4 reference to the hits and the number of files.

02:41:40 5 So this is -- like I said, it's just the word
02:41:42 6 committee. So you see several references here to audit
02:41:46 7 committee, committee draft, committee chore, committee
02:41:52 8 something --

02:41:52 9 MS. MILLER: I can't read it. You are one up on me.

02:41:56 10 MR. MOGIN: Committee Michael.

02:42:02 11 MR. MAROVITZ: Is that from the word index?

02:42:02 12 MR. MOGIN: It is.

02:42:04 13 MS. MILLER: It's from the imported version. It's in
02:42:08 14 their system.

02:42:08 15 MR. MOGIN: So subcommittee is in there, for example,
02:42:14 16 activity committee, desktop standards committee, economic
02:42:18 17 modeling committee, conference committee, compensation
02:42:22 18 committee. Those are just some of the -- it looks like
02:42:28 19 management, but I can't swear to what it says. It's a little
02:42:32 20 mushy down there.

02:42:34 21 Up here we have references to Tennessee committee,
02:42:46 22 compensation conference, economic modeling, some sort of data
02:42:52 23 service committee, desktop standards.

02:42:56 24 MS. MILLER: You have to use the arrows, Dan. There
02:42:58 25 you go.

02:43:00 1 MR. MOGIN: Union negotiating, ethics and human
02:43:02 2 something committee, several subcommittees, steering
02:43:06 3 committees, mill committee, it looks like, management
02:43:12 4 committee, market advisory committee, I.T. committee, more
02:43:18 5 steering committees.

02:43:22 6 Anyway, those are just the examples that we have come
02:43:26 7 up with quickly.

02:43:30 8 MR. MAROVITZ: Judge, I guess I'd raise two points on
02:43:34 9 that. If I were the one making an argument that the requests
02:43:38 10 for production were overly broad, I would probably rely on
02:43:42 11 exactly what Mr. Mogin just showed you, dozens and dozens and
02:43:48 12 dozens of different kinds of committees that likely have no
02:43:50 13 bearing on this case. That's exactly why we shouldn't have to
02:43:52 14 produce everything that says committee on it.

02:43:56 15 But the second point I would make is that the kinds
02:44:02 16 of tools that the lawyers have at their disposal, the
02:44:08 17 plaintiffs' lawyers and the defense lawyers have, to be able
02:44:10 18 to look not just at a word index but also in the documents for
02:44:16 19 the word committee, for example, allows lawyers to go back and
02:44:20 20 see all the documents where the word committee is used.

02:44:24 21 For instance, one thing that we are going to do when
02:44:26 22 we go back to the firm is we're going to go back and look to
02:44:30 23 see in our production set all the times that the word
02:44:34 24 "organization" or "organizational chart" is used so we can
02:44:38 25 pretty quickly figure out whether the plaintiffs are right and

02:44:42 1 whether we have only produced 20 pages of organizational
02:44:44 2 charts or whether what we think is right, whether we have
02:44:48 3 produced a stack that's at least an inch, if not higher.
02:44:50 4 That's what we are going to do. I presume the plaintiffs are
02:44:54 5 going to do the same thing.

02:44:54 6 So these tools that the lawyers have to be able to
02:44:58 7 search for specific words like committee or like
02:45:00 8 organizational chart are pretty powerful and they provide an
02:45:04 9 awful lot of information to both sides, based upon the
02:45:08 10 documents that have been produced.

02:45:10 11 MR. MOGIN: But we can only use the tools on the
02:45:12 12 documents that have been produced. We don't know from that
02:45:16 13 that any of those documents have been produced. That's just
02:45:20 14 the words from the word index.

02:45:24 15 THE COURT: What I saw today, I actually thought I
02:45:32 16 didn't do a very good job on the request to produce
02:45:36 17 considering I spent 16 hours. I thought I was so specific on
02:45:40 18 what I was going to do with every one of them, and I just --
02:45:44 19 it was like -- I was like a deer in the headlights here, I
02:45:48 20 think.

02:45:48 21 But of what I did come away from was trying to get
02:45:52 22 you to tell the other side what are the issues you're the most
02:46:00 23 concerned with because I think some of your requests were
02:46:06 24 overly broad and I think they were somewhat restrictive.

02:46:12 25 So what I see the meet and confer is a way to narrow

02:46:18 1 without the judge flipping a coin or doing what judges do in
02:46:22 2 order to get the happy medium.

02:46:24 3 This committee came out very specific. I think what
02:46:30 4 Mr. Mogen said, this is what I heard him say, is, Let's take
02:46:36 5 even your 28 top executives. Let's just even take those
02:46:42 6 people. If the way Temple organized itself and those folks
02:46:46 7 were part of committees, went to committee meetings, did
02:46:52 8 committees, there might be documents with them, now they want
02:46:56 9 a much broader scope of who you're searching, but this is
02:47:02 10 important; he thinks that conspiratorial acts might be somehow
02:47:12 11 exposed. If you had committee meetings and you knew who was
02:47:16 12 on it, it might give him an idea of somebody else who might be
02:47:18 13 involved in this. And it didn't seem to them, they didn't
02:47:22 14 think you gave any committee information, but I don't know
02:47:30 15 what they're basing it on because they don't -- I mean, I
02:47:34 16 don't know. But that seemed to be an important thing.

02:47:38 17 MR. MAROVITZ: Let me --

02:47:40 18 THE COURT: Unlike just a general give me more.

02:47:42 19 MR. MAROVITZ: Let me say this. As I sit here, I
02:47:48 20 don't know the answer to the question that I proposed. I
02:47:52 21 don't know, for instance, whether or not we have committee
02:47:54 22 organizational charts. We will endeavor to find out.

02:47:58 23 THE COURT: Good. That's good. That's good.

02:48:00 24 MR. MAROVITZ: But what we don't want to be put in a
02:48:04 25 position of having to do is to reconstruct who was on which

02:48:10 1 committee from the sorts of documents that are truly available
02:48:14 2 to both sides. There are a variety of -- you know, we
02:48:20 3 produced -- I'm going to say it, we produced more than a
02:48:24 4 million pages of documents in this case, so those documents
02:48:26 5 consist of emails and Word documents and all sorts of things,
02:48:32 6 and they describe events, and they describe communications
02:48:38 7 between them people, and if people went to a committee
02:48:40 8 meeting, maybe they're in those documents. We have a green
02:48:44 9 committee at our firm. People probably email about the green
02:48:48 10 committee and say what the agenda is for the day.

02:48:50 11 My only point is that we should -- org charts
02:48:58 12 themselves are -- we understand what they are. We have
02:49:00 13 produced a lot of them, and we will take a look to see whether
02:49:04 14 there is a committee-type org chart, but we shouldn't be asked
02:49:06 15 to create things that aren't in this form for the purposes of
02:49:10 16 responding to a request for production.

02:49:12 17 MR. MOGIN: Nobody has asked that they create
02:49:14 18 documents.

02:49:14 19 THE COURT: Right.

02:49:14 20 MR. MOGIN: But we also haven't restricted it to
02:49:16 21 organizational charts. We have asked for documents that
02:49:20 22 discuss organizational structure. We have used organizational
02:49:24 23 charts as an exemplar.

02:49:26 24 MR. MAROVITZ: And that's where we think it's very
02:49:28 25 broad. That's the problem. So that's why I say --

02:49:30 1 THE COURT: And that's why I think without giving
02:49:34 2 anything up, the godfather was right. That what are you going
02:49:40 3 to go to the mat on? That's what I am sort of saying to you
02:49:44 4 is that what issues are your real issues here, not for today,
02:49:50 5 but before we come back -- I can give you one example. What's
02:49:54 6 the one -- my favorite one where I agree with the plaintiffs
02:50:00 7 on the go get it from the third party. There is some answers,
02:50:04 8 go get it from a third party.

02:50:08 9 MR. VAN TINE: That appeared in many the responses
02:50:08 10 concerning trade associations.

02:50:12 11 THE COURT: I didn't understand that at all. Okay?
02:50:14 12 I was trying to look for some common kind of responses, and I
02:50:20 13 didn't understand with this kind of iterative process, for one
02:50:26 14 thing, I don't see that kind of response as helpful, and it
02:50:34 15 seems like it would be more direct to just get it.

02:50:38 16 So like on that issue, that's like a category of
02:50:42 17 things that I could give you. If I had to be writing a darn
02:50:44 18 opinion on all of this, I could tell you right now. So kind
02:50:48 19 of move on, move on, let's just do it, and get it over with.

02:50:54 20 MR. MAROVITZ: Loud and clear, Judge.

02:50:56 21 THE COURT: Loud and clear. Right.

02:50:58 22 But having said that, okay, and you really have to --
02:51:02 23 because you've got all this experience in antitrust and you're
02:51:06 24 going to have to prosecute this case, in other cases that you
02:51:16 25 have had, has it been -- has committee structure and what kind

02:51:20 1 of committees, not their green committee, I don't think their
02:51:22 2 green committee is -- you know, you're going to have to make a
02:51:26 3 conspiratorial act -- I mean, if you could kind of be more --
02:51:34 4 not today, but actually give them more what they're looking
02:51:42 5 for. And then if they say no, then come to me, and I then say
02:51:46 6 whether that's fair game or not.

02:51:48 7 MR. MOGIN: Fair enough, your Honor, but I will tell
02:51:50 8 you off the top of my head, in my experience, I have never
02:51:54 9 ever had to fight like this in any case for this basic
02:51:58 10 organizational material, ever.

02:51:58 11 THE COURT: Well, I am sure they are going to go back
02:52:02 12 because I want to see -- you know, I go way back with
02:52:06 13 Ms. Miller on her other antitrust case where she was the
02:52:10 14 plaintiff's lawyer, I want you to know, and she was a mighty
02:52:14 15 plaintiff's lawyer, and Mr. Marovitz here, so I'm sure she is
02:52:18 16 going to go back and she is going to pull out every
02:52:20 17 organization chart, and maybe you can't find it because we
02:52:24 18 didn't give you an index, but she is going to go back and find
02:52:26 19 them. That's true. When she says anything to me, her word is
02:52:34 20 really good with me. So I am sure those organization charts
02:52:38 21 are there.

02:52:42 22 Now, do the organization charts include committee,
02:52:48 23 now that's another question.

02:52:50 24 MS. MILLER: Which I have written down.

02:52:50 25 THE COURT: Which you have written down.

02:52:52 1 And then maybe there's something else other than
02:52:54 2 committee. My kind of -- when I was doing criminal for 25
02:52:58 3 years in this building, none of my people in the mob ever had
02:53:06 4 committees. We didn't have committees. I mean, mine was like
02:53:10 5 much easier. Mine was much easier to defend.

02:53:14 6 MR. MOGIN: It wasn't hard to prove a conspiracy
02:53:16 7 either.

02:53:16 8 THE COURT: It wasn't.

02:53:18 9 MR. FREED: They had organizations.

02:53:20 10 MS. MILLER: It was a little more clear cut.

02:53:22 11 THE COURT: Anybody have anything else? It's just
02:53:24 12 about 3:00 o'clock. We have to do this two times tomorrow.

02:53:26 13 MR. MAROVITZ: We want to thank you very much.

02:53:28 14 MS. MILLER: For taking the time.

02:53:30 15 THE COURT: I felt like we -- I mean, this is a work
02:53:32 16 in progress. I mean, there aren't any books on how to do
02:53:36 17 this. I think we will be more successful tomorrow. I am
02:53:40 18 going to be a little bit tighter.

02:53:42 19 Who is coming in the morning?

02:53:44 20 MR. MOGIN: We have Mr. McKeown in the morning and
02:53:46 21 Mr. Neuwirth in the afternoon. So save your strength, your
02:53:50 22 Honor.

02:53:54 23 THE COURT: Mr. McKeown and I.

02:53:58 24 MR. MOGIN: I mean for the afternoon.

02:54:00 25 THE COURT: Is it going to be that kind of afternoon?

02:54:02 1 MS. MILLER: I won't be here.

02:54:04 2 THE COURT: I better get some candy or something,

02:54:06 3 cookies.

02:54:08 4 MR. MAROVITZ: I am sure it will be as professional

02:54:10 5 as it's always been.

02:54:12 6 THE COURT: It will. Thank you very much.

02:54:14 7 MS. MILLER: Thank you.

02:54:14 8 THE COURT: We will send out any ideas. I mean, I --

02:54:18 9 and mostly if this process is ever going to work, you are

02:54:22 10 going to go back after today and you're going to come back

02:54:26 11 with -- particularly with any ideas on what to do with this

02:54:30 12 mess of these requests to produce documents. If you have any

02:54:34 13 ideas at our meeting in a couple weeks or that you could

02:54:40 14 really disseminate between everybody between now and then, I'd

02:54:44 15 love to hear your ideas on that to move the ball along. Okay?

02:54:50 16 MR. MAROVITZ: Thank you.

02:54:50 17 MS. MILLER: Thank you, your Honor.

02:54:52 18 MR. FREED: Thank you.

02:54:54 19 MR. MOGIN: Thank you.

02:54:54 20 THE COURT: Hope you are staying someplace nice. Go

02:54:56 21 to a great dinner. It looks like it's beautiful outside.

22 (Which were all the proceedings had in the above-entitled

23 cause on the day and date aforesaid.)

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1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.
3

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Carolyn R. Cox
Official Court Reporter
Northern District of Illinois

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/s/Carolyn R. Cox, CSR, RPR, CRR, FCRR